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In the Supreme Court of the United States

MAYOR MARC H. MORIAL and
THE CITY OF NEW ORLEANS
Petitioner

VERSUS

SMITH & WESSON CORP., et al.
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether, the retroactive application of a statute targeted against a political subdivision of a state, and depriving that political subdivision of vested rights, is an unconstitutional Bill of Attainder under U.S. Const. Art 1 § 10?

Whether, under recent diverse decisions in the Circuit Courts, which hold that political subdivisions of states are not absolutely barred from bringing federal constitutional actions against their various states, considering the expanding and developing principles of local autonomy and home rule powers, should such political subdivisions have actions under the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS

1) Mayor Marc H. Morial
2) The City of New Orleans
3) Smith & Wesson Corp.
4) Sturm Ruger & Co.
5) Beretta U.S.A.
6) Colt's Manufacturing Co.
7) Glock, Inc.
8) Taurus International Marketing, Inc.
9) SigArms, Inc.
10) Bryco Arms, B.L.
11) Jennings, Inc.
12) Phoenix Arms
13) Davis Industries
14) Navegar, Inc.
15) FMJ, Inc.
16) Arms Technology, Inc.
17) Cash America Pawn of New Orleans
18) Albert's Jewelry & Loan Pawn
19) Professional Sport Shop, Inc.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Louisiana is reproduced in the appendix at A-3. The Judgment and Reasons for Judgment of the Civil District Court for the Parish of Orleans, State of Louisiana, is reproduced in the appendix at A-2. The original complaint in this matter is reproduced at A-1. The Louisiana Statutes are reproduced at A- 4 and A-5.

JURISDICTIONAL STATEMENT

The Supreme Court of the State of Louisiana rendered its final judgment on April 27, 2001. This Court has jurisdiction pursuant to 28 USC § 10.

STATUTES INVOLVED

This case involves U.S. Const. Article 1 § 10 regarding Bills of Attainder and the Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioners filed *Morial v. Smith & Wesson, et alia*, No. 98 - 18578, Division "M", in Civil District Court for the Parish of Orleans, on October 30, 1998, reproduced at A-1. Petitioners sought to recover medical costs, pension benefits, investigative expenses and all other damages available under the Louisiana Products Liability Act and existing tort law.

At the time of filing the City of New Orleans had a "right of action" as established by the Louisiana Constitution (1974) and specifically articulated in its Home Rule Charter. The Constitution and 1954 City Charter gives the City the "right" to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912).

Defendant manufacturers, their trade associations and gun lobby interests announced, immediately after Mayor Morial ["Morial"] and the City of New Orleans ["the City"] filed suit, that they would have the Louisiana Legislature enact laws to defeat the suit, *Morial v. Smith & Wesson.* Representatives of defendants and gun lobby agents solicited the Governor and members of the State Legislature to enact such laws. In response, the Louisiana Legislature enacted Act 291 of 1999 and Act 1299 of 1999 in order to defeat *Morial v. Smith & Wesson* and the other pending litigation. The Governor signed these acts into laws which are now codified at La. R.S. 40:1799 and 9:2800.60, reproduced in appendix at A-4 and A-5. The Legislature enacted these laws for a single purpose: to protect the

special interests of one favored industry.

Colt, Glock, and other defendant manufacturers relying on newly enacted statutes La. R.S. 40:1799 and 9:2800.60 filed peremptory exceptions of no right of action and no cause of action. The Trial Court found La. R.S. 40:1799 and 9:2800.60 unconstitutional for a variety of reasons, Judgment reproduced at A-2.

The Trial Court found that petitioners had a right of action and that their right was not barred by La. R.S. 40:1976. The Trial Court questioned the power of the Legislature to abridge by statute, rights specifically and expressly granted to the City by the Louisiana Constitution as that Constitution (1974) and 1954 City Charter had clearly given the City the "right" to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912). Act 159 specifically gives the City the right to sue "in all matters and proceedings. . . ." (Emphasis added) The Trial Court found that the Louisiana Constitution does not give the Legislature the authority to abridge these rights, even in the proposed exercise of its police powers.

The Trial Court found that the Legislature cannot abridge rights and powers which the state constitution had established, even those rights and powers the constitution had established for the political subdivisions of the state. In Louisiana only two political subdivisions are "constitutionally-established home rule entities": the City of New Orleans and the City of Baton Rouge. These two home rule entities were not created by the legislature, but were created

directly and expressly by the Constitution of the State of Louisiana (1974). Home rule entities are more than creatures of the legislature, since their powers are granted directly by the constitution. *Francis v. Morial*, 455 So.2d 1168, 1173 (La. 1984) (emphasis added). That same constitution does not give the Legislature the power to prevent constitutionally established home rule entities from bringing suit under the established provisions of tort, contract and other settled bodies of law. Article 3§12 of the Louisiana Constitution specifically prohibits the Legislature from passing laws in order to affect the outcome of pending civil or criminal litigation.

Defendants themselves acknowledged that Act 291 was adopted and made retroactive in order to defeat this pending lawsuit. Ignoring the City's constitutionally established right "to sue", the Louisiana Supreme Court held that the City's right of action was set aside by La. R.S. 40:1799 as being interpretive of La. R.S. 40:1976 (1984), opinion reproduced at A-3. Pertinent to the question petitioners present this Court, the Trial Court found that retroactive application of La. R.S. 40: 1799 would unconstitutionally deprive the City of "Vested Rights" under the Due Process Clause and the Equal Protection Clause of the United States Constitution. The Supreme Court of Louisiana erred in disagreeing with the finding of the Trial Court,. citing older jurisprudence which fails to take into consideration the developing and expanding principles of local autonomy and home rule powers such as articulated in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.1979) and *Branson School Dist. Re-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998). These courts clearly reject the principle that political subdivisions of a

state cannot assert federal constitutional claims against their respective states.

The City of New Orleans has broad home rule powers and attendant rights arising from tradition and custom and clearly articulated in the Louisiana Constitution at Art. VI, § 4 and in the City's Home Rule Charter, and which expressly include the right" to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912). Act 159 specifically gives the City the right to sue "in all matters and proceedings. . . ."(emphasis added). Those rights were reconfirmed and again "vested" by the enactment of the Louisiana Constitution in 1974.

The Louisiana Supreme Court held that the City's expressly articulated constitutional rights were preempted by subsequent enactment of La. R.S. 40: 1796 (1985), eleven years later. That Court's holding raises the issue: Can Legislative enactment take away from public entities, such as the City of New Orleans, rights which have been created by the state constitution or that of the United States prior to such enactment? The answer is clearly "no." The Louisiana Supreme Court's decision also raises the issue: Can the legislature act unilaterally for the benefit of one special interest group without violating the United States Constitution? Underlying the Louisiana Supreme Court's decision are several premises equally false in law and constitutional government.

First, the Court presumed that the Legislature's power was "omnipotent," when in fact, it is "plenary."

Properly received "plenary" means "full, complete or entire" (See: Gardner. *A Dictionary of Modern Legal Usage*, at p. 668); plenary does not mean omnipotent. The power of any legislature is plenary only within its constitutionally circumscribed sphere of function. A legislature has only the power to do what its constitution allows it to do. It can do no more. The long and growing list of legislative enactments that have been soundly and swiftly set aside as unconstitutional by this Court and others demonstrates that the power of the legislature is always limited by the Louisiana Constitution, the United States Constitution and often by jurisprudence. But as the Legislature is not omnipotent, neither is it omniscient.

The Founding Fathers understood that the extensive power of state legislatures would give rise to abuses, some "incompatible with the interests of the Union and others with the principles of good government." To protect the people and other departments of government against such abuses, they insisted "that there ought always to be a constitutional method of giving efficacy to constitutional provisions." THE FEDERALIST No. 80 (Alexander Hamilton)

The United States Constitution implements these principles of limitation on legislative authority through the separation of powers, federalism and individual rights protections. The provisions most relevant here are found in article 1, §10 (Bill of Attainder Clause), and the Fourteenth Amendment (Equal Protection Clause and Due Process Clause) of the Constitution of the United States of America. It is against these state and federal constitutional provisions which La. R.S. 40:1799, 9:2800.60 and 40:1796 must be read.

REASONS FOR GRANTING THE WRIT

While the antique jurisprudence held consistently that political subdivisions could not bring federal constitutional claims against their respective states, recent developments and expanding principles of local autonomy and home rule powers have caused a reversal of this thinking. The Louisiana Supreme Court relied exclusively upon the older line of reasoning in deciding the matter now before this Court.

However, the opinions in *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.1979), *Branson School Dist. Re-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), and *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998) each demonstrate that the federal circuit courts now agree that political subdivisions are no longer barred from bringing federal constitutional actions against their respective states. The circuits courts are divided as to what actions can be brought and under the provisions of which federal laws and statutes.

The home rule charter guaranteed the City of New Orleans by the 1974 state constitution gives it the broadest autonomy of any city in the country. As such, the City is representative of the trend in government which has expanded the principle and exercise of local autonomy and home rule power.

The Louisiana Constitution and the City Charter give the City the right to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings. . . ." (Section 1(b) of Act 159 of 1912). Act 159 specif-

ically gives the City the right to sue "in all matters and proceedings. . . ." (emphasis added)

The Louisiana Supreme Court found that Plaintiffs had no right of action, after the enactment of La. R.S. 40:1799 by Act 291 of 1999, because Act 291 was interpretive of La. R.S. 40:1796 (1985). The Court incorrectly found that Section 1796, which purports to preempt political subdivisions from "enacting" any "ordinance" or "regulation" more restrictive than state law concerning in any way the sale, purchase, possession, ownership, transfer, transportation, license, or registration of firearms, ammunition, or components of firearms or ammunition," denies the City the right to sue for damages caused by the use of firearms.

To support its conclusion, the Supreme Court was willing to wrench the text of Section 1976 and conclude that the Legislature understood the verb "enact" to mean "to bring suit" and understood the nouns "regulation" or "ordinance" to mean "lawsuit". Neither the syntax nor context of the pertinent passage of La. R.S. 40:1796 supports re-definition. Likewise, no authority supports such an extrapolation.

The Oxford English Dictionary defines "enact" as "said of legislative measure" and gives the historical example (1764-65) of Blackstone *Comm. II* 82 "Magna Carta . .enacts that, etc." It gives the additional definition of the verb to mean "of a legislative authority: To make into an act" and gives the historical example (1646) EDW. IV. in *Patson Lett. 493 II* 165 "He shall . . have the said fundacion inacted and auctorised in the parlement next holden." The Dictionary goes on to define the noun "enactment" as: (1)

the action of enacting (a law), (2) that which is enacted; an ordinance of a legislative authority, a statute, or (3) the particular provisions of a law. H.L. Mencken's *American Language* provides nothing to the contrary. Garner, *A Dictionary of Modern Legal Usage*, is equally clear: "enactment" = (1) the action or process of making (a legislative bill) into law <enactment of the bill>; or (2) a statute <a recent enactment>. In no instance, historical, currently received or legal usage, is the verb (enact) or noun form (enactment) used to mean anything other than the legislative act of making a law, or in the noun form, it only means "the law" that has been passed. The Louisiana Supreme Court changed not only the text of the law (La.. R.S. 40:1976), but the English language itself. Section 1976 cannot preempt more than it purports to preempt.

The courts have held consistently that a pre-emptive law, such as Section 1796, can preempt, at most, what it purports to preempt — enactments - - ordinances and regulations. In Louisiana, preemption questions are decided under the same analytic framework as that used by federal courts deciding federal preemption questions. *See Hildebrand v. City of New Orleans*, 549 So.2d 1218, 1227 (La. 1989). The United States Supreme Court has stated, in considering the scope of preemption in an express preemption situation: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre- empted." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S.Ct. 2608, 2618 (1992). Thus, when Section 1796 purports to preempt political subdivisions from enacting "any ordinance or regulation," it is only ordinances and regulations that are preempted. *See Benelli v. City of New*

Orleans, 474 So.2d 1293, 1294 (La. 1985). In *Benelli* the Court held that its appellate jurisdiction under La. Const. art. 5, § 5(D), when "a law or ordinance has been declared unconstitutional," did not give it jurisdiction over a case where an executive order had been found unconstitutional. "The executive order or regulation promulgated by the police superintendent that the court of appeal found to have been declared unconstitutional plainly was not 'a law or ordinance' within the meaning of art. 5, § 5(D)." *Id.*

The City's broad home rule powers include the power to sue, and Section 1796 preempts, at most, only ordinances and regulations.[1] Therefore, the City clearly had a right of action under the Products Liability Act as it existed prior to the adoption of Act 291 of 1999.

It is well-established that legislatures — including the Louisiana Legislature and Congress — must act like legislatures, i.e. they must legislate prospectively, impartially, and with generality, rather than making particularized decisions which only punish or benefit specific individuals. *See, e.g., INS v. Chadha,* 462 U.S. 919, 960-62, 966-67 (1983) (Powell, J., concurring); *Nixon v. Administrator of Gen. Servs.,* 433 U.S. 425, 484-86 (1977) (Stevens, J., concurring); *United States v. Brown,* 381 U.S. 437, 442-47, 454 n. 29 (1965); *Springer v. Government of the Philippine Islands,* 277 U.S. 189, 201-02 (1929); *Hurtado v. California,* 110

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[1] Because of the especially strong home rule powers of the City, Section 1796 might even not preempt City ordinances and regulations.

U.S. 516, 535-36 (1884); *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87, 137-39 (1810); *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 605, 629-32, 656-59, 663, 668-69, 1678 (2d ed. 1988); THE FEDERALIST No. 48 (James Madison); Note, *The Bounds of Legislative Specification*, 72 YALE L.J. 330, 344-47 (1962). This essential principle, which Professor Tribe describes as "governmental regularity," is mandated by several specific Constitutional provisions as well as penumbras emanating from those provisions. Especially relevant federal constitutional rights include: the prohibition of Bills of Attainder, the ban on ex post facto laws, the Contract Clause (all three in Article I, §10 of the U.S. Constitution), the Takings Clause, the Due Process Clause, as well as the general requirements of separation of powers.[2]

Petitioners contend that the Louisiana Legislature violated this basic constitutional principle of governmental regularity by passing retroactive legislation which was designed to benefit only one segment of a single industry to the direct detriment of plaintiffs in this single lawsuit. The Founding Fathers sought to prevent precisely this sort of targeted legislation. It is against just such legislation that petitioners assert these federal constitutional claims.

The Louisiana Supreme Court cited only antique cases supporting the outdated proposition that cities cannot assert federal constitutional claims against their state

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[2]State constitutional provisions banning local or special laws and protecting separation of powers also ensure governmental regularity.

governments. *See, e.g., Hunter v. City of Pittsburgh,* 207 U.S. 161 (1907); *City of Trenton v. State of New Jersey,* 262 U.S. 182 (1923). However, these cases are from an era that preceded strong home rule and full-bodied development of constitutional rights. Today, cities — especially home rule cities — often sue their state governments based upon state and federal constitutional law. For example, *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir. 1979), held that *Hunter, Trenton* and similar cases were actually substantive interpretations of the constitutional provisions involved and should not be considered absolute barriers to suits by municipalities against states. *Rogers* explained that the concept of standing meant something different when those cases were decided. *Id.* at 1070. *Accord United States v. State of Alabama,* 791 F.2d 1450, 1455 (11th Cir. 1986) (following *Rogers* and refusing to apply a *per se* rule against municipal standing to sue). *See also City of Charleston v. Public Serv. Comm'n,* 57 F.3d 385, 390 (4th Cir. 1995); *Branson School Dist. v. Romer,* 161 F.3d 619, 628 (10th Cir. 1998); *Palomar Pomerado Health System v. Belshe,* 180 F.3d 1104, 1109 (9th Cir. 1999) (Hawkins, J., concurring); *Kennecott Corps. v. Salt Lake County,* 702 P.2d 451, 455 (Utah 1985). *See generally* SANDS & LIBONATI, LOCAL GOVERNMENT LAW § 306 (1999).

In the developing and expanding concepts of local autonomy, courts such as those whose opinions are cited above, have afforded local citizens and their political subdivisions federal constitutional rights as groups which were traditionally reserved to individuals. The facts in this matter demonstrate that even Fourteenth Amendment protections are often needed to prevent targeted, special interest legislation.

Closely related to principle of governmental regularity is the federal constitutional ban on Bills of Attainder. *See* U.S. Const. art. I, § 10 ("No state shall . . . pass any Bill of Attainder"). Act 291 constitutes just such an unconstitutional Bill of Attainder.

"The United States Supreme Court has defined such bills as 'legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial.'" *State v. Baxley*, 94-2982 (La. 5/22/95), p.11-12; 656 So.2d 973, 980 (quoting *Brown*, 381 U.S. at 448-49 (1965). *See also Nixon*, 433 U.S. at 468.

The purpose of the Bills of Attainder Clause is to protect individuals or groups from being targeted for a trial-by-legislature. *See South Carolina v. Katzenbach*, 383 U.S. 324 (1966). Furthermore, the Clause is "to ensure that the legislature would not overstep the bounds of its authority and perform the functions of the other departments." *Brown*, 381 U.S. at 44. In particular: "Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals." *Id.* at 461. The same is true of the state legislatures. *See Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."). Thus, despite the Louisiana Supreme Court's acknowledgment of broad claims for legislative authority, it is clear that any power possessed by the Louisiana Legislature is subject to federal constitutional constraints, including the

constraint that the Legislature act like a legislature, by legislating broadly and generally rather than targeting particular individuals or groups. *See generally* TRIBE, *supra*, at 643-45,655-56 n.18, 622-63, and 1678 n.7.

Here, the Louisiana Legislature violated this basic principle, by adopting the retroactive provision of Act 291, which specifically targets the City of New Orleans for bringing the instant lawsuit. The punishment is severe — the City is forever barred from bringing this or other similar suits against any gun manufacturers. Furthermore, it is clear that Act 291 had exactly this punitive purpose. The retroactive provision of Act 291 violates the federal constitutional prohibition against Bills of Attainder.

Using Act 291 as the ground for dismissing the instant lawsuit would violate even the deferential rational basis test for the Equal Protection Clause of the Fourteenth Amendment. That test requires that the challenged legislative classification must be "rationally related to a legitimate governmental interest." *Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). *See also Johnson v. Robinson*, 415 U.S. 361, 374-75 (1974). Act 291 cannot pass constitutional muster under this test, because there is no legitimate governmental interest or rational basis for the Act, which simply insulates one segment of society from lawsuits, while targeting a single, pending lawsuit for dismissal. *See Moreno*; *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

By forbidding the City to proceed with its pending

lawsuit, Act 291 destroys a right which has vested under state law, and therefore denies the City rights under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

As the Louisiana Fourth Circuit explained in a parallel situation: "The right to file a damage suit in tort is a vested property right. If we were to give retroactive effect to the amending language of [the act there challenged], we would effectively terminate plaintiff's right and in so doing give an unconstitutional interpretation to the statute." *Green v. Liberty Mutual Ins. Co.*, 352 So.2d 366, 369 (La. App. 4th Cir. 1977).

CONCLUSION

On October 30, 1998, Plaintiffs filed this action against certain defendants, including gun manufacturers and their trade associations. Those defendants publically stated their intent to have the Louisiana Legislature enact and the Governor sign laws which would defeat the City's suit and other suits of private party plaintiffs. To accommodate the special interests of the defendants in these pending suits, the Louisiana Legislature passed Act 291 of 1999 and Act 1299 of 1999, and the Governor signed those Acts into laws which are now codified as La. R.S. 40:1799 and 9:2800.60.

The Founding Fathers, understanding that the extensive power of state legislatures could give rise to abuses, such as those witnessed in the enactment of the statutes now before this Court, created safeguards against such legislative usurpations. The United States Constitution incorporated

the principle of separation of powers and provided the means and authority for each branch of government to exercise its own powers, free from intrusion by the other branches.

While the antique jurisprudence held consistently that political subdivisions could not bring federal constitutional claims against their respective states, recent developments and expanding principles of local autonomy and home rule powers have caused a reversal of this thinking. The Louisiana Supreme Court relied exclusively upon the older line of reasoning in deciding the matter now before this Court.

Rogers v. Brockette, 588 F.2d 1057 (5th Cir.1979), *Branson School Dist. Re-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998), and *Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir. 1998) each demonstrate that political subdivisions are no longer barred from bringing federal constitutional actions against their respective states. The circuits courts are divided as to what actions can be brought and under the provisions of which federal laws and statutes. These matters, now before this Court, should be reviewed for the purpose of making that determination.

The Louisiana Supreme Court held that these retroactively enacted laws defeated Petitioners' suit. Petitioners contend that the Louisiana Legislature violated the basic constitutional principle of governmental regularity by passing retroactive legislation which was designed to benefit only one segment of a single industry to the direct

detriment of Plaintiffs in this single lawsuit. The Founding Fathers sought to prevent precisely this sort of targeted legislation. It is against just such legislation that petitioners assert these federal constitutional claims.

The retroactive application of Act 291 violates the Constitution of the United States of America. Almost universally, retroactive application of a law effecting substantive rights would violate an individual's rights of Due Process and Equal Protection under the Fourteenth Amendment, and would be a prohibited Bill of Attainder. Those protections should be understood to encompass group rights as well. In the developing and expanding concepts of local autonomy, courts such as those whose opinions are cited above, have afforded local citizens and their political subdivisions, federal constitutional rights as groups which were traditionally reserved to individuals. The facts in this matter demonstrate that even Fourteenth Amendment protections are often needed to prevent targeted, special interest legislation.

The Legislature, at the express and public request of defendants in this litigation, has provided special protection for them, a small, favored group of tortfeasors, and has protected them from liability for their acts by targeting particular plaintiffs and a small number of pre- existing lawsuits for untimely dismissal.

These retroactive statutes undermine the very foundation of federal and state constitutional government. Political subdivisions need the protections afforded by all provisions of the federal constitution. This Court should

address the division in the opinions of the federal circuit courts and establish which federal constitutional rights can be asserted by political subdivisions against their various states.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

For the Honorable Marc H. Morial, and
The City of New Orleans

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APPENDIX

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THE CITY OF NEW ORLEANS

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APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

Div. M Filed Oct 30, 1998

MAYOR MARC H. MORIAL, and *DISTRICT COURT*
THE CITY OF NEW ORLEANS

VERSUS

SMITH & WESSON. CORP., STURM RUGER & CO., BERETTA U.S.A., COLTS MANUFACTURING CO-, GLOCK INC., TAURUS INTERNATIONAL MARKETING, INC., SIGARMS, INC., LORCIN ENGINEERING CO., INC., BRYCO ARMS, B.L. JENNINGS, INC., PHOENIX ARMS, DAVIS INDUSTRIES, NAVEGAR, INC.(D/B/A"INTRATEC"), FMJ (AKA "FULL METAL JACKE"), INC., ARMS TECHNOLOGY, INC., CASH AMERICA PAWN OF NEW ORLEANS, MAGIC MONEY PAWN SHOP, NEW ORLEANS PAWN SHOP, ALBERTS JEWELRY & LOAN PAWN, PROFESSIONAL SPORT SHOP, INC., AMERICAN SHOOTINGS SPORTS COUNCIL, INC., NATIONAL SHOOTING SPORTS FOUNDATION, INC., SPORTING ARMS AND AMMUNITION MANUFACTURERS'INSTITUTE, INC.

FILED: _____ DEPUTY CLERK_____

PETITION

MARC H. MORIAL, a person of the full age of majority and the duly elected and present MAYOR OF THE

CITY OF NEW ORLEANS, brings this action on behalf of the other named. plaintiff, the CITY OF NEW ORLEANS and respectfully represents.

1.

Under the Constitution of the State of Louisiana, and the Home Rule Charter for the City of New Orleans, " Mayor and the City of Now Orleans are responsible for the health, safety and welfare of their citizens, and the Mayor has the duty to protect the interest of the general public.

2.

For many years the City has suffered harm and has incurred significant expenses associated with the manufacture. marketing. promotion, and sale of firearms which are unreasonably dangerous under Louisiana law, for the reasons stated herein. In addition to the other unreasonably dangerous design features, lack of safety features, and inadequate warnings described herein, defendants'guns are unreasonably dangerous as they can be and are fired by unauthorized users, including but not limited to children, criminals, mentally unstable persons, and others who put themselves and/or others at risk when they possess a firearm.

3.

This action is brought under the laws cited herein to recover damages, and for other relief as may be obtained, for the harm unjustly, intentionally and wrongfully done

and continuing to be done to the City of New Orleans, the Police Department of the City of New Orleans and to the People of New Orleans by the various defendants, who have been and continue to be unjustly enriched thereby at the expense of the City and its residents.

4.

The defendants are companies and organizations who manufacture, distribute, promote, market, sell and or instruct in the use of firearms which are sold without the means to prevent their being fired by unauthorized users, without adequate warnings which would prevent such shootings by alerting users of the risks of guns and of the importance of proper storage of guns, and without other safety features and warnings which would prevent shootings by unauthorized users.

Actions by defendants have caused the city to pay out large sums of money to provide services including but not limited to necessary police, medical, and emergency services, health care, police pension benefits and related expenditures, as well as to have lost substantial tax revenues due to lost productivity.

5.

At all pertinent times the defendants have been able to manufacture, market sell and/or promote firearms which prevent shootings by unauthorized users, including firearms which incorporate safety devices intended to prevent unauthorized users from firing firearms if and when they come

into possession of them. However, defendants have failed to do so.

6.

Defendants' guns are inherently and unreasonably dangerous in that they enable any person who gains access to them - including but not limited to children. who can be expected to be unable to properly handle them or understand their risks - to fire them, even though it was feasible to design the guns to prevent unauthorized users from firing them. Defendants' guns are also inherently and unreasonably dangerous in that these guns were not distributed with adequate warnings and instructions as to their risks and as to proper storage, and in fact they were marketed and promoted in a manner which suggested that they did not pose such risks to users and their households, and which suggested, promoted, and encouraged unsafe storage practices. Defendants' guns are also inherently and unreasonably dangerous in that their design features insufficiently warn all foreseeable users, including unintended users, that a round of ammunition may be housed in the firing chamber.

At all pertinent times it was reasonably foreseeable to defendants that without the aid of some other design feature and/or warning device, defendants' guns would end up being used in a tragic, preventable shooting by an unauthorized user. Many of these shootings are unintentional shootings, often by children who do not fully understand or appreciate how to properly handle a gun, or understand its risks.

With regard to those guns of defendants which are semi-automatics, at all pertinent times it was foreseeable that users, including adolescents, would mistakenly believe that a semi-automatic gun would not fire if the ammunition magazine is removed. At all pertinent times 9 was foreseeable that users of semi-automatic guns would not understand or appreciate that an undetectable round of ammunition may be housed in the firing chamber of the gun even though the detachable ammunition magazine has been removed or unloaded, and that preventable, unintentional shootings would result given defendants' designs.

Defendants were at all pertinent times aware of these inherent and unreasonable dangers in the design of their firearms.

7.

The design of defendants' guns, which enable any person who gains possession of them to fire them, and which does not make users aware that a round of ammunition is housed in the firing chamber, results in thousands of unintentional shooting deaths and non-fatal injuries every year. The General Accounting Office estimates that 23% of the annual 1,400 to 1,500 unintentional shooting deaths occur because the user of the gun was not aware that a round of ammunition had been loaded into the gun's firing chamber as many as 320 to 345 deaths each year. For each of these deaths, there are many unintentional shooting injuries that are not fatal.

A vast percentage of the injuries and deaths caused

by an undetected round of ammunition in the firing chamber occur when an unintended user of the gun, such as an adolescent unintentionally shoots another person According to the General Accounting Office, approximately 35% of all unintentional shooting deaths involve users of guns who were between the ages of 13 and 18. Adolescents are naturally attracted to accessible guns and notoriously discount the risks associated with handling a firearm.

The design of defendants' guns, which enable any person who gains possession of them to fire them, also results in thousands of adolescent suicides. The odds that potentially suicidal adolescents will kill themselves double when a gun is kept in the home. A youth aged 10-19 commits suicide with a gun every six hours. Guns are the method used in 65% of male teen suicides and 47% of female teen suicides. Among 15-19 year-olds, firearm- related suicides accounted for 81% of the increase in the overall rate of suicide from 1980-1992.

The design of defendants' guns, which enable any person who gains possession of them to are them, also results in thousands of homicides by unauthorized users, including juveniles. Many of these homicide victims are themselves children and teenagers. Many of these perpetrators gained access to guns in homes or through theft.

At all pertinent times it was foreseeable that defendants' guns would fall into the hands of unintended users. The Centers for Disease Control estimate that 1.2 million elementary-aged, latch-key children have access to guns in their homes, there are guns in approximately one-half of

the homes in this country, and one survey reports that 30% of these gun-owners who have children in the home keep Their guns loaded. Another survey reports that 36% of gun owners with children in their home keep their guns unlocked. In one survey, nearly 60% of the children between the ages of 10 and 19 responded that they can acquire a gun should they want one. The same survey reports that 15% of the children between the ages of 10 and 19 reported that they had carried a gun on their person in the past 30 days. At all such times it was also foreseeable that when unintended users would gain access to these guns, that either the guns would be loaded or that the user would be able to obtain ammunition.

At such times it was also foreseeable that when unintended users would gain access to defendants' guns, tragic, preventable shootings would result. It was foreseeable at these times that many of these shootings would be unintentional, and many would involve children - as victims and/or as shooters. It also was foreseeable that many of these shootings would involve suicides by children and adolescents. It also was foreseeable that many of these shootings would involve homicides by juveniles, whose victims are juveniles.

8.

At the time the defendants manufactured, distributed, promoted and/or sold these guns, defendants knew and should have known of the unreasonable dangers of their guns, including those described in the foregoing paragraphs. Defendants were also aware of safety devices, warnings,

and other measures which would prevent and decrease these dangers. Defendants failed to remedy these deficiencies in their guns, warnings, instructions, promotions and advertising; failed to adequately warn customers of these dangers; and failed to inform customers or distributors or retailers of these devices and measures which could prevent or decrease these dangers and failed to determine whether devices were feasible or effective.

9.

Citizens of the City of New Orleans, particularly its children, repeatedly have been victimized by defendants' unreasonably dangerous products. Year after year, New Orleans children are grievously injured or Wiled because defendants' guns are sold without the means to prevent their use by unauthorized users, without adequate warnings which would prevent such shootings by alerting users of the risks of guns and of the importance of proper storage of guns, and without other safety features which would prevent shootings by unauthorized users. For example, in New Orleans,

- In April of 1996, a six-year old boy was unintentionally wounded by his nine-year old brother when the boys found a .38 caliber revolver in a trash bin.

- In October of 1995, a five-year-old boy was wounded in his kindergarten class when another child grabbed the gun of a security guard at the school.

- In December of 1994, a six-year-old boy found his grandfather's gun and unintentionally shot his two younger sisters, ages four and three.

- In July of 1994, a twelve-year-old boy was shot to death by his fourteen year-old neighbor who found a loaded .357 magnum revolver under a mattress.

- In July of 1994, a fourteen-year-old boy was killed in an unintentional shooting at the friends home where he and two other teens were playing with guns.

- In May of 1994, three boys, a fourteen-year-old and a ten-year-old were booked on charges of negligent homicide in the fatal shooting of a ten-year-old boy as he was riding his bicycle.

- In December, of 1993, an eleven-year-old was shot while he and his thirteen-year-old brother played with guns in their home.

These tragedies, and others like them, demonstrate that the citizens of the City of New Orleans are under a continuing threat of injury and death. particularly to children, from defendants' unreasonably dangerous products.

10.

At all times pertinent, these defendants purposefully and intentionally engaged in these activities, and continue to do so, knowing full well that their products could be sold

and/or made with the means to prevent their firing by unauthorized users, and that their warnings and instructions were inadequate to alert owners and foreseeable users of the risks posed by their guns, and the importance and means of properly storing guns, and that the advertising used to promote those products were likely to cause many owners to store their guns unlocked and/or loaded, which would enable unauthorized users to fire them.

At all times pertinent, these defendants purposefully and intentionally engaged in these activities, and continue to do so, knowing full well that their products could be sold and/or made with the means to prevent their firing by unauthorized users, and that by failing to use such means, made it possible for guns stolen from private residences, gunstores and other locations to be employed by unauthorized users in violent criminal acts. Furthermore, defendants purposefully and intentionally engaged in these activities knowing full well that the citizens of the City of New Orleans, their Police Officers and others would be substantially certain to suffer injuries and substantial expenses due to shootings and crimes which would result and to the threat of shootings and crimes, and that the city and its people would be injured thereby.

At all times pertinent the defendants purposefully and intentionally engaged in these activities, and continue to do so, knowing full well that the city, in its role of providing protection and care for their citizens, would provide or pay for additional police protection, emergency services, pension benefits, health care and other necessary facilities and services due to the threat of use of defendants' products

and for certain of their citizens and police officers harmed by the use of the defendants" products, as well as lose substantial tax revenue due to lost productivity and, in the absence of performance of such duty by the defendants, that the city itself thereby would be harmed.

11.

At all times pertinent, defendants, who account for most of the handguns sold to the general public, have acted in concert with respect to, among other things:

(a) their failure to develop and implement the means to prevent their guns from being fired by unauthorized users,

(b) discouraging the development and implementation of the means to prevent guns from being fired by unauthorized users;

(c) their failure to develop end implement other safety features; and

(d) their failure to issue adequate warnings alerting users to the risk of guns and to the importance of proper storage of guns.

At all times pertinent, defendants have tacitly agreed, colluded, or cooperated with respect to:

(a) their failure to develop and implement the means to prevent their guns from being fired by unauthorized users;

(b) discouraging the development and implementation of the means to prevent guns from being fired by unauthorized users;

(c) their failure to develop and implement their safety features; and

(d) their failure to issue adequate warnings alterting users to the risk of guns and to the importance of proper storage of guns.

At all times pertinent defendants have adhered to industry-wide standards or customs relating to:

(a) the failure to develop and implement the means to prevent guns from being fired by unauthorized users;

(b) discouraging the development and implementation of the means to prevent guns from being fired by unauthorized users;

(c) their failure to develop and implement other safety features; and

(d) their failure to issue adequate warnings alerting users to the risk of guns and to the importance of proper storage of guns.

12.

VENUE

Venue for this action arises under Louisiana Code of Civil Procedure Article 42 et seq. as certain defendant corporations are domiciled in the Parish of Orleans and organized in the State of Louisiana and the actions of other co-defendants took place in the City of New Orleans. As well, the damages suffered by plaintiffs occurred in the City of New Orleans, State of Louisiana.

13.

PARTIES

PLAINTIFFS:

PLAINTIFF MARC H. MORIAL is a resident of the Parish of Orleans, State of Louisiana, and at all times pertinent was and is the Mayor of the City of New Orleans, Louisiana. As mayor Marc H. Morial has the capacity to initiate legal action on behalf of the City and its police department

PLAINTIFF THE CITY OF NEW ORLEANS is a body politic, as constituted under the Constitution of the State of Louisiana and operating under their Home Rule Charter has the authority and obligation to initiate legal actions through the person of the duly elected mayor, Marc H. Morial. He does so hereby.

MANUFACTURER/SELLER DEFENDANTS:

Defendant SMITH AND WESSON CORP. is a corporation organized in the State of Massachusetts, with its principal place of business in the State of Massachusetts, that manufactures and regularly sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

Defendant STURM, RUGER & CO. is a corporation organized in the State of Delaware, with its principal place" of business in the State of Connecticut, that manufactures and regularly sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

Defendant BERETTA U.S.A. is a corporation organized in the State of Maryland, with its principal place of business in the State of Maryland, that manufactures and regularly sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

COLT'S MANUFACTURING CO. is a corporation organized in the State of Connecticut, with its principal place of business in the State of Connecticut that manufactures and regularly sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

GLOCK INC. is a corporation organized in the State of Georgia, with its principal place of business in the State of Georgia, that manufactures and regularly sells, ships and advertises firearms that can be fired by unauthorized users

in the City of New Orleans and State of Louisiana.

TAURUS INTERNATIONAL MANUFACTURING, INC. is a corporation organized in the State of Florida, with its principal place of business in the State of Florida, that regularly sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

SIGARMS, INC. is a corporation organized in the State of New Hampshire, with its principal place of business in the State of New Hampshire, that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

LORCIN ENGINEERING CO., INC. is a corporation organized in the State of California, with its principal place of business in the State of California, that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized use in the City of New Orleans and State of Louisiana.

BRYCO ARMS is a corporation organized in the State of Nevada, with its principal place of business in the State of California, that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

B.L. JENNINGS, INC. is a corporation organized in the State of Nevada, with its principal place of business in the State of Nevada, that regularly sells, ships and advertises firearms out can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

PHOENIX ARMS is a corporation organized in the State of Arizona, with its principal place of business in the State of California, that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

DAVIS INDUSTRIES is a corporation organized in the State of California, with its principal place of business in the State of California, that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

NAVEGAR, INC. (D/B/A/ INTRATEC) is a corporation organized in the State of Florida, with its principal place of business in the State of Florida, that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

FMJ (A.K.A. 'FULL METAL JACKET-), INC. is a corporation organized in the State of Tennessee that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

ARMS TECHNOLOGY, INC. is a corporation organized in the State of Utah, with its principal place of business in the State of Utah, that regularly manufactures, sells, ships and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

CASH AMERICA PAWN OF NEW ORLEANS

Trade name Cash America of Louisiana is a corporation organized in the State of Louisiana, with its principal place of business in the Parish of Orleans, State of Louisiana, that regularly sells, and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

MAGIC MONEY PAWN SHOP is a corporation organized in the State of Louisiana, with its principal place of business in the Parish of Orleans, State of Louisiana, that regularly sells, and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

NEW ORLEANS PAWN SHOP is a corporation organized in the State of Louisiana, with its principal place of business in the Parish of Orleans, State of Louisiana, that regularly sells, and advertises firearms that can be Fred by unauthorized users in the City of New Orleans and State of Louisiana.

ALBERT'S JEWELRY & LOAN PAWN is a corporation organized in the State of Louisiana, with its principal place of business in the Parish of Orleans, State of Louisiana, that regularly sells, and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

PROFESSIONAL SPORTS SHOP, INC. is a corporation organized in the State of Louisiana, with its principal place of business in the Parish of Orleans, State of Louisiana, that regularly sells, and advertises firearms that can be fired by unauthorized users in the City of New Orleans and State of Louisiana.

TRADE ASSOCIATION DEFENDANTS:

Defendant AMERICAN SHOOTING SPORTS COUNCIL, INC. ("ASSC") is a tax exempt business league under section 5 01(c)(6) of the Internal Revenue Code with its principal office in the State of Georgia. ASSC is an industry trade association composed of firearms manufacturers and sellers, including some or all of the manufacturer/seller defendants.

Defendant NATIONAL SHOOTING SPORTS FOUNDATION, INC. ("NSSF") is a tax exempt business league under section 501 (c)(6) of the Internal Revenue Code with its principal office in Newtown, Connecticut NSSF is an industry trade association composed of firearms manufacturers and sellers, including some or all of the manufacturer/seller defendants.

Defendant SPORTING ARMS AND AMMUNITION MANUFACTURERS' INSTITUTE, INC. ('SAAMI") is a tax exempt business league under section 501(c)(6) of the Internal Revenue Code with its principal office in Newtown, Connecticut. SAAMI is an industry trade association composed firearms; manufactures and sellers, including some or all of the manufacturer/seller defendants.

14.

FIR2I CAUSE OF ACTION
LSA-R.S. 9:2800 LOUISIANA
PRODUCTS LIABILITY ACT, UNREASONABLY
DANGEROUS IN DESIGN

Plaintiffs incorporate all paragraphs by this refer

ence as if fully set forth.

Defendants are liable under the Louisiana Products Liability Act LSA-R.S. 9:2800.56 et seq. as their products were unreasonably dangerous in design at the time these weapons left the manufacturers' control and such defects in design were the proximate cause of the damages suffered by plaintiffs.

Defendants are liable under the Louisiana Products Liability Act LSA-P-S. 9:2800.56 et seq. as they failed to employ alternative designs which would have reduced, if not prevented many of plaintiffs' damages. Their failure to employ these alternative designs was a proximate cause of the damages suffered by plaintiffs.

Defendants are liable under the Louisiana Products Liability Act, LSA-R.S. 9:2800.56 et seq. as they each knew the likelihood that their products designs would cause plaintiffs' injuries and they knew the gravity of these injuries.

Defendants are liable under the Louisiana Products Liability Act, LSA-RS. 9.2800.56 et seq. as they each knew or reasonably should have known that the gravity of the damages which might be and which have been suffered by plaintiffs would greatly outweigh the burden on them as manufacturers and makers of adopting such alternative designs, and the gravity of those damages would outweigh the adverse effect if any, on the legitimate utility of the products.

Defendants are liable for. the damage caused as a result of the design defects of their products. including the damage incurred by plaintiffs.

Defendants' conduct was a direct and proximate cause of the injuries suffered by plaintiffs.

Plaintiffs suffered substantial actual injury and damages as the direct and proximate result of defendants wrongful acts described above.

Plaintiff specifically alleges that alternative design would have reduced the injuries suffered by the city, police, emergency services, health services and other agencies which he represents.

15.

SECOND CAUSE OF ACTION
LSA-RS. 9:2800 LOUIS~ PRODUCTS LIABILITY ACT
FAILURE TO INCLUDE SAFETY
DEVICES IN DESIGN

Plaintiffs incorporate all paragraphs reference as if fully set forth.

Defendants are liable under the Louisiana Products Liability Act LSA-R-S. 9:2800.56 et seq. as the products were unreasonably dangerous in design, at the time these weapons left the manufacturers' control and such defects in design were the proximate cause of the damages suffered by plaintiffs and that alternative designs which incorporated safety devices, including but not limited to devices which would:

1 . prevent these weapons from being fired by unauthorized users;

2. alert users that a round was in the chamber;

3. prevent these weapons from being fired when the magazine was removed from them.

Defendants are liable under the Louisiana Products Liability Act LSA-P-S. 9:2800.56 et seq. as they each participated in the design and/or manufacture of products which were, defective because they did not incorporate available safety devices and/or participated in the manufacture of those defective products which were the proximate cause of the damages suffered by plaintiffs.

Defendants are liable under the Louisiana Products Liability Act, LSA-R-S. 9:2800.56 et seq. as they failed to employ alternative designs incorporating safety devices which would have reduced, if not prevented many of plaintiffs' damages.

Their failure to employ these alternative designs incorporating safety devices was a proximate cause of the damages suffered by plaintiffs.

Defendants are liable under the Louisiana Products Liability Act, LSA-R.S. 9:2800.56 et seq. as they each knew the likelihood that their products' designs would cause plaintiffs' injuries and they knew the gravity of these injuries.

Defendants are liable under the Louisiana Products Liability Act, LSA-R.S. 9:2800.56 et seq. as they each knew or reasonably should have known that the gravity of the damages which might be and which had been suffered by plaintiffs would greatly outweigh the burden on them as

manufacturers and makers of adopting such alternative design, and the gravity of those damages would outweigh the adverse effect, if any, on legitimate utility of the products.

16.

THIRD CAUSE OF ACTION
LSA-R.S. 9:2800,57 LOUISIANA PRODUCTS LIABILITY *ACT*
UNREASONABLY DANGEROUS BECAUSE OF INADEQUATE WARNING

Plaintiffs reassert all paragraphs above and allege the same as if fully set forth herein.

Defendants are liable under the Louisiana Products Liability ACT, LSA-R S. 9:2800 *et seq.* at the time the guns were manufactured, and at the time they left the control of defendants, the guns were unreasonably dangerous in the hands of reasonably foreseeable users, including households with children, not only because of their design, but because they did not have a suitable warning or instruction as to the risks of the weapon, including, but not limited to, adequately warning owners of the risks that minors, could gain access to guns, how to properly store weapons, that a round may be hidden in the chamber of a pistol, that their pistols could be fired even with the ammunition magazine removed and the attendant risks that could and did thereby occur.

In addition to fairing to provide an adequate or suitable warnings or instructions to users, including households with children, defendants actively promoted and advertised their guns in a manner which did not alert customers and

potential customers, as well as retail dealers who would be expected to sell and recommend their guns, to the risks of guns, and which, on the contrary, suggested that by purchasing guns for their households they would become more safe, that the design of the guns was safe, and that families could safely store guns unlocked and accessible to minors.

For the foregoing reasons as well, defendants'guns were unreasonably dangerous.

As a direct and legal result of the inadequate warnings, instructions, advertising and promotion of the guns, plaintiffs suffered the damages alleged herein.

17.

FOURTH CAUSE OF ACTION
NEGLIGENCE IN THE SALE OF FIREARMS:
DEFENDANTS PAWN SHOPS AND RETAILERS

Plaintiffs reassert all paragraphs above and allege the same as if fully set forth herein.

Defendants knew, or in the exercise of care should have known, that at the time they left control of defendant certain of the firearms it sold were unreasonably dangerous in that they could be fired by unauthorized users, failed to alert users that a round is in the chamber and/or could be fired when the magazine is removed.

Defendants knew, or in the exercise of care should have known, that at the time they left control of defendant, certain of the firearms it sold were unreasonably dangerous in the hands of reasonably foreseeable users, including

households with children, not only because of their design, but because they did not have a suitable warning or instruction as to the risks of the weapon, including, but not limited to, adequately warning owners of the risks that minor could gain access to guns, how to properly store weapons, and the attendant risks that could and did thereby occur.

It was reasonably foreseeable that firearms sold by defendant because of their unreasonably dangerous design and lack of suitable warnings, would be used to harm the city's citizens and that the city, in its role of providing protection and care for its citizens, would provide or pay for additional police protection, emergency services, pension benefits, health care and other necessary facilities and services due to the threat of use of defendants' firearms and for certain of their citizens and police officers harmed by the use of defendant's firearms, as well as lost substantial tax revenues due to lost productivity.

18.

NEGLIGENCE
[TRADE ASSOCIATIONS]

At all times pertinent, defendants ASSC, NSSF and SAAMI have been associations in which some or all of the manufacturer/seller defendants have been members.

At all times pertinent defendants ASSC, NSSF and SAAMI have acted in concert with, tacitly agreed with, colluded, cooperated with and aided and abetted the manufacturer/seller defendants, with respect to, among other things:

(a) their failure to develop and implement the

means to prevent their guns from being fired by unauthorized users;

(b) discouraging the development and implementation of the means to prevent guns from being fired by unauthorized users;

(c) their failure to develop and implement other safety features; and their failure to issue adequate warnings alterting users to the risk of guns and to the importance of the proper storage of guns.

It was reasonably foreseeable that, as a result of the above-described conduct of defendants ASSC, NSSF and SAAMI the manufacturer/seller defendants would continue to manufacture and/or sell guns that because of their unreasonably dangerous design and lack of suitable warnings, would be used to harm the City's citizens and that the City, in its role of providing protection and cam for its citizens, would provide or pay for additional police protection, emergency services, pension benefits, health care and other necessary facilities and services due to the threat of use of defendants' firearms and for certain of its citizens and police officers harmed by the use of defendants' firearms, as well as lost substantial tax revenues due to lost productivity.

19.

DAMAGES

Plaintiffs re-allege and incorporate herein the foregoing allegations. As a direct and proximate result of the actions and occasions of the defendants as alleged above, plaintiffs have been obligated to pay and have paid millions of dollars in the past to enhance police protection, emer-

gency services, police pension benefits, medical care, facilities and services due to the threat of use of defendants' products and for certain of those aforementioned citizens injured by the defendants' actions and products, and have lost substantial tax revenue due to lost productivity.

The city was legally obligated to pay the aforementioned sums and did not conduct itself in any wrongful manner in being so obligated to pay and in paying the aforementioned sums.

To prevent an unjust enrichment the defendants should indemnify the city for its enhancement of police protection, emergency services, police pension benefits, medical care, facilities and services, as well as lost tax revenues, due to defendants' products and actions.

Wherefore the plaintiffs pay for relief and judgment against the defendants, jointly and in solido as follows:

a. For damages in an amount which is sufficient to provide restitution and repay the plaintiffs for the sums they have expended on account of the defendants' wrongful conduct with said amount to be determined at trial;

b. For damages in restitution for the sums of money to be paid by plaintiffs in the future on account of the defendants' wrongful conduct

c. For prejudgment interest, as well as plaintiffs' reasonable attorneys' fees, expert witness fees and other costs of this action;

d. For punitive damages in such amount as will sufficiently punish the defendants for their conduct and as ill serve as an example to prevent a repetition of such conduct in the future;

e. For such other and further extraordinary equitable, declaratory and/or injunctive relief as permitted by taw as necessary to assure that plaintiffs have an effective remedy; and

f. For such other and further relief, as the Court deems just and proper, to which plaintiffs may be entitled.

Plaintiff requests a trial by jury.

WHEREFORE, plaintiff prays that defendants be cited with petition and after all due process had, judgment be entered in favor of plaintiffs for all damages, including judicial interest costs an attorney fees.

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Professional Sports Shop, Inc. 920 Julia Street New Orleans, Louisiana 70113

SERVICE WILL BE MADE THROUGH THE LOUISIANA LONG ARM STATUTE:

SMITH AND WESSON CORPORATION

BERETTA U.S.A

COLTS MANUFACTURING COMPANY

GLOCK INC.

TAURUS INTERNATIONAL MANUFACTURING, INC.

SIGARMS, INC.

LORCIN ENGINEERING COMPANY, INC.

B.L. JENNINGS, INC.

PHOENIX ARMS

BRYCO ARMS

DAVIS INDUSTRIES

NAVEGAR, INC. d/b/a INRACTEC

FMJ (AKA 'FULL METAL JACKET). INC.

ARMS TECHNOLOGY, INC.

AMERICAN SHOOTING SPORTS COUNCIL, INC. (-ASSC-)

NATIONAL SHOOTING SPORTS FOUNDATION, INC. ("NSSF"))

SPORTING ARMS AND AMMUNITION MANUFACTURES' INSTITUTE, INC. ("SAAMI")

APPENDIX B

CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 98-18578 DIVISION "D"

MAYOR MARC H. MORIAL and
THE CITY OF NEW ORLEANS

VERSUS

SMITH & WESSON, CORP., et al.

JUDGMENT AND REASON FOR JUDGMENT

This court has been asked to decide whether the City of New Orleans and Keith M. Ignatik have a right of action and/or cause of action against firearm manufactures and sellers of firearms as well as the constitutionality of two recently enacted statutes by the Louisiana legislature-c, [.a. R.S. 40:1797.1 and La. R.S, 9:2900.60

In light of the evidence, memoranda and arguments, this court finds that all of defendants' Peremptory Exceptions of No Right of Action and No Cause of Action as they apply to plaintiffs should be **DENIED** for the reasons explained below.

REASONS FOR JUDGMENT

I. PROCEDURAL HISTORY

On October 30, 1998, plaintiffs Mayor Marc H. Morial and the City of New Orleans filed this suit against Smith and Wesson Corp., Sturm, Ruger & Co., Inc., Glock, Inc., Taurus International Manufacturing, Inc., Phoenix Arms, Bryco Arms, B.L. Jennings, Inc., Colt's Manufacturing Co., Inc., Arms Technology, Inc., Navegar, Inc., Beretta U.S.A Corp., Sigaram, Inc., Lorcin Engineering Co., Inc., Davis Industries, FMJ, Inc., Cash America Pawn Shop, Magic Money Pawn Shop, New Orleans Pawn Shop, Albert's Jewelry & Loan Pawn, American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., Sporting Arms and Ammunition Manufacturers' Institute, Inc. seeking damages for expenses the City of New Orleans has incurred due to defendants' alleged defective products and alleged unlawful actions, respectively.

On November 23, 1998, defendants Smith & Wesson and Ruger removed this suit to tile United States District Court for the Eastern District of Louisiana. After assignment to the Honorable Ginger Berrigan, an order was issued governing the remand procedure which set a briefing schedule for the Motion to Remand, filing of motions, filing of answers, stayed all discovery, and all other pertinent matters unrelated to the remand procedure. On August 18, 1999, Justice Berrigan remanded the action to state court.

On August 18, 1999, Defendant Glock, Inc.

filed its first Peremptory Exception of No Right of Action and No Cause of action. Thereafter, the remaining defendants filed timely motions which adopted all of Glock's arguments. On September 7, 1999, plaintiffs filed a Motion for Leave to File an Amended Petition which added new defendants and additional causes of action. On October 4, 1999, Defendants manufacturers filed their Supplemental Motion and Supporting Memorandum in Opposition to Plaintiff's Amended Petition.

On September 8, 1999, defendants trade associations filed Declinatory Exceptions of Lack of Personal Jurisdiction. On November 19, 1999, oral arguments were heard and the Court granted their Declinatory Exceptions dismissing the remaining defendant trade associations from the pending lawsuit.

On November 2, 1999, Keith Ignatik, filed a motion to intervene into the present lawsuit which was granted by then District Court Judge Pro Tern Piper Griffin on November 10,1999. On December 7, 1999, defendant manufacturers filed a Peremptory Exception of No Right of Action against Ignatik's intervention.

On January 28, 2000, both parties made oral arguments on their respective Peremptory Exceptions of No Right and No Cause of Action. At the close their arguments, the Court stated that it would render its judgment and reasons for judgment 30 days from the date of the hearing.

II. PLAINTIFFS HAVE A RIGHT OF ACTION UNDER, ACT 291, LOUISIANA REVISED STATUTE 40:1797.1.

A. § 1797.1 cannot be applied retroactively because plaintiffs have a vested right to bring suit under the City of New Orleans' home rule charter.

Generally, Louisiana courts have held that a right is vested when:

> "the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. The right must be absolute, complete and unconditional, independent of contingency, and a mere expectancy of future benefit or contingent interest in property ... does not constitute a vested right." Rico *v. Vangundy,* 461 So.2d at 462, citing *Tennant v. Russell,* 214 La. 1046, 39 So.2d 726, 728 (1949), and *Draughn v. Mart,* 411 So.2d *1188, * 12, Adams v. City of Baton Rouge, 673* So.2d 624, 632 (La. App. 4th Cir.), writ denied, 415 So.2d 944 (La. 1982).

The power of the City of New Orleans to initiate a lawsuit is reserved by Louisiana Constitution Article VI, § 4 and its Home Rule Charter. The New Orleans Home Rule Charter preserves a broad range of powers for the City. In Section 2-10 *1, Powers,* it provides, in pertinent part:

> "(1) The city shall retain, to the same extent as if herein repeated, all rights, powers, privileges and

authority that it has or could claim under the law of this state at the time of the adopting hereof, except as herein expressly modified.

(4) The City, in addition to the rights, powers, privileges, and authority expressly conferred upon it by this Charter, shall have the right, power, privilege and authority to adopt and enforce local police, sanitary and similar regulations, and to do and perform all of the acts pertaining to this local affairs property and government, which are necessary or proper in the legitimate exercise of its corporate powers and municipal functions."

These provisions, in essence, provide for a continuing claim and subsequent enlargement of the utmost powers of initiation available to the City under the constitution, City of *New Orleans v. Board of Commissioners,* 640 So,2d 23 7 (La. 1994).

These broad powers are secured by the Louisiana Constitution Article VI, § 4 which provides, in pertinent part:

"Every home rule charter or plan of government existing or adopted shall remain in effect and may be amended, modified or repealed as provided therein. *Except as inconsistent with this constitution, each local governmental subdivision which as adopted such a home rule charier or plan of government shall retain the powers, Junctions and duties in effect when this constitution is adopted.* If its charter permits, each of them shall have the right to powers and functions granted to other local governmental subdivisions," La. Const. Art, VI, § 4. (emphasis added)

1. Plaintiffs' right to bring suit against defendants is not preempted by Louisiana Revised Statute 40:1796.

In Louisiana, preemption question are decided under the same analytic framework as used by federal courts deciding federal preemption questions. *Hildebrand v. City of New Orleans, 549* So.2d 1218 (La. 1989). In considering the scope of preemption in an express preemption situation: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted," *Cipollone v. Liggett, Inc., 505 U.S. 504, 112* S.Ct. 2608, 2618 (1992).

Defendants argue that plaintiffs do not have a vested right because § 1796 preempts the City of New Orleans from adopting ordinances or regulation of the sale of firearms or components of firearms that are more restrictive than those of the state. Furthermore, they argue that La. R.S. § 1797.1 furthers the goal of § 1796 by barring a City from seeking through litigation that which it is prohibited from adopting by ordinance.

This argument is without merit for two distinct reasons. First, § 1796 specifically addresses *ordinances* and *regulations,* not lawsuits. It provides, in pertinent part:

> ."No governing authority of a political subdivision shall enact after July 15, 1985, any *ordinance* or *regulation* more restrictive than state law concerning in any way the sale, purchase, possession, ownership, transfer, transportation, license, or registration of firearms, ammunition or components of firearm or ammunition..."

There was no express prohibition against a political subdivision from suing a gun manufacturer at the time this suit was filed in 1998. As mentioned above, extending the scope of preemption beyond its clear boundaries has been disfavored by the Court.

Furthermore, defendants attempt to argue that plaintiffs' lawsuit is synonymous with an "ordinance" or "regulation" as used in § 1796, Jurisprudence has proven otherwise. In *Chapman Bordelon,* 242 La. 637 (La. 1962), the Supreme Court explained,

> "Generally the word 'ordinance' is understood to mean a legislative act of a municipality, as the Court of Appeal construed it. This is not necessarily so in all cases, however, for, as the judge of the Court of Appeal who dissented in the instant case said, 'ordinance' is often used as a generic term which encompasses all of the acts of a municipal board or council whether administrative or legislative in nature.... Thus it will be seen that the word' 'ordinance' can have a very broad or quite a narrow meaning; that it can refer to all of the legislative enactments of a municipality, such as motions, resolutions, decrees, laws, etc., or can simply mean a permanent rule of action commonly known as a law." *See also Melancon v. State Board of Education, 249* La. 604, 188 So.2d 419, 420 (La. 1966).

Despite this liberal interpretation of the word ordinance, the Supreme Court has made no indication that it should encompass a municipality's ability to bring suit against another entity. As a result, the plaintiffs were within

the scope of their vested rights as provided for in Article VI, § 4 and the home rule charter.

2. Plaintiffs' lawsuit does not abridge the State's Police Power.

The legislature by a general law may deny or revoke the initial delegation of home rule power functions; but no law may not revoke, change or affect a home rule government's discretion to deploys its powers and functions *unless it is necessary to prevent an abridgement of' the reasonable exercise of the state's police power. Francis v Morial, 455* So.2d 1168 (La. 1984).

Defendants have failed to prove that the act of the legislature in enacting a retroactive provision in § 179 1.1 was reasonably necessary and appropriate for the accomplishment of a legitimate object of its police power. In *Francis,* the Supreme Court held that "any state law which changes or affects i.e., produces an alteration in or material influence upon, the local government's structure and organization or the distribution or redistribution of its powers and functions is prohibited." *Id.* at 1172.

Louisiana Constitution Article VI, §9 acts as a counter balance to §4 providing that "notwithstanding any provision of this Article, the police power of the state shall never be abridged." However, state's police power can only extend to such measures the are reasonable under a] I circumstances. *Francis, 455* So.2d at 1172; *Schwegmann Bros, v. La, Bd. of Alcoholic Bev. Control, 216* La. 148, 43 So.2d *248* (1949) In order to be reasonable, the means adopted

must be reasonably necessary and appropriate for the accomplishment of legitimate objects falling within the scope of the power. *Id.* at 1172. Importantly, to sustain legislation under tile police power the courts must be able to see that its operation tends in some degree to prevent an offense or evil or other is to preserve public health, morals, safety or welfare and if a statute discloses no such purpose, has no real or palpable invasion of rights secured by fundamental law, it is the duty of the courts so adjudged n thereby give effect to the constitution. Id. at 1173; Town *of Eros v. Howell,* 137 La. 342, 68 So. 632 (La. 1915); *Hi-Lo Oil Co. v. City of Crowley,* 274 So.2d 673 (La. 1973); *State ex rel* Galle v. N.O., 113 La. 371 36 So. 999 (1904).

This court finds that § 1797. 1, in effect, invades the fundamental rights reserved to the City of New Orleans. On its face, it addresses a topic of interest that reaches beyond this City's boundaries. Generally, the regulation of firearms has been considered to be in the interest of the public and as an exercise of the police power vested in the legislature. *State v. Hamlin*, 497 So.2d 1369 (La. 1986). However, this police power is not absolute. Our courts have put in place an express test of reasonableness that cannot be ignored. Here, the legislature has reached beyond the scope of its police power to diffuse the present effect that the City's lawsuit could have on the safety of its citizens prospectively and the state as a whole by retroactively applying § 1497. 1.

Defendants cite many cases which stand for the general proposition that the state may regulate firearms. This right cannot be denounced. However, this court believes the retroactivity of this law is designed to eliminate this lawsuit

for the immediate benefit of a certain class of private citizens, not the general public welfare. Thus, it is unconstitutional.

B. The Retroactive Provision of §1497.1 is a Prohibited Special Law

Article 111 § 12 provides, in pertinent part,

> "Section 12. (A.) Prohibitions. Except as otherwise provided in this constitution, the legislature shall not pass a local or special law....(3) concerning any civil or criminal actions...." La. Const. Art. 111, 12(A)(3). (emphasis added)

The prohibition against a local or special law is intended to reflect a policy decision that legislative resources and attention should be concentrated on matters of general interest and that purely local matters should be left to local governing authorities. *Kimball v. Allstate Ins. Co,* 712 So.2d 46 (La, 1998); H. Alston Johnson 11, *Legislative Process,* 36 La. L.Rev. 549, 549 (La. 1976); *Louisiana Paddlewheels v, Louisiana Riverboat Gaining Commission,* 94-2015, p.7 (La. 11/30/94), 646 So.2d 885. Thus, the Court's inquiry into whether § 1797. 1, Section 2 is an unconstitutional local or special law begins with a determination of whether the law is, in fact, local, special or general law.

Jurisprudence provides the most guidance in interpreting this constitutional provision. Generally, a statute is considered to be local if it operates only in a particular locality or localities without the possibility of extending its

coverage to other areas. When the law is limited to certain parishes, it is immediately suspect as a local law. *Concerned Business and Property Owners of DeSoto, Inc. v, DeSoto Parish School Board, 531* So,2d *436,* 442 (La. 1988). In contrast, a general law operates equally and uniformly upon all persons brought within the relations and circumstances for which it provides or operates equally for a designated class which has been founded on a reasonable classification. *Slate v. Labauve,* 359 So.2d 181 (La. 1978). A general law may confine its coverage to a class or subset of local governments if the method of classification is reasonable. *Kimball v. Allstate Ins. Co.,* 712 So.2d 46 (La. 1998), citing Lee Hargrave, *"Statutory " and "Horatory " Provisions of the Louisiana Constitutional of 1974, 43* La. L.Rev. *647, 668* (La. 1983).

However, even though a statute may not constitute a local law under the above provisions, it may still be prohibited by La. Const. Art. 111, § 12 if it is a special law dealing with one of its enumerated topics. Generally, a special law affects only a fraction of the persons or a portion of tile property by a classification, granting privileges to some persons while denying them to others. More importantly, it confers particular privileges, or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. *Kimball,* 712 So.2d at 5 1; *Labauve, 359* So.2d at 182; *Teachers' Retirement Systems of Louisiana v. Vial,* 317 So.2d 179 (La. 1975) ("A statute is special if it is ... directed to secure some private advantage or advancement for the benefit of private persons."),

Considering the aforementioned criteria, it is evident that § 1797.1 is not a local law, There is no indication that its application is limited to any particular city in the state, but appears to be applicable to the entire state. However, Section 2 of § 1797.1 is a special law. First, it singles out all existing or actions pending on its effective date and all claims arising or action filed on and after the effective date of the statute, Clearly, Section 2 is not a general law because its privileges and restrictions affect only a portion of the classification (here the City of New Orleans) and there appears to be no reasonable basis for this classification except to eliminate plaintiffs' lawsuit.

Second, Subsection (2) concerns a prohibited subject listed under La. Const. Art. 111, Section 12(A)(3), namely, existing civil actions. In *Kimball v. Allstate Insurance Co,* 712 So.2d 46 (La. 1998), the Supreme Court recently ruled that a portion of a statute could be held unconstitutional because it was a special law. Therein, plaintiffs filed suit as a result of an automobile accident that occurred before the effective date of Act *598, Jury Trial Prohibited,* which at the time of the filing of the suit, limited jury trials in East Baton Rouge Parish. Plaintiffs attacked the constitutionality of the statute alleging that Act *598* could not be applied retroactively to the date of original suit in 199 1. The trial court held that the Act was a special law and unconstitutional, The First Circuit Court of Appeals remanded the case to the trial court for a determination of the constitutionality of Section C of Act *598.* The trial court upheld its initial decision and the case was directly appealed to the Supreme Court.

The Supreme Court agreed with the trial court's decision. Specifically, the court classified Section C of Act *598* as special because of its original reference to any and all suits pending in East Baton Rouge Parish and more importantly, because the section expressly affected pending civil actions:

> "This court has consistently defined this portion of the Constitution to prohibit the legislature from passing a local or special law which affects *any particular lawsuit. Everett v. Goldman, 359* So.2d *1256 (La. 1978).* (The "concerning any civil action" prohibition applied only where there is "concerned a distinct lawsuit or lawsuits or where the group of affective litigants or lawsuits has not rationally distinctive characteristics." *Id*; *State v, McCue, 141* La. *417, 75 So. 100 (1917);,51ale v. Feller, 141* La. 58, *74 So.* 629 *(1917)* ... Subsection (C) concerns and affects not only an individual lawsuit, but more egregiously, any and all lawsuits in which the City of Baton Rouge of the Parish of East Baton Rouge is made a defendants". Id. at 53.

In comparison, Section *2* of § 1797.1 does not expressly refer to the lawsuit filed by plaintiffs. Nonetheless, its unnamed reference to "all pending lawsuits" cannot be mistaken. Facially, Act 219 applies to every political subdivision in this state, but Section 2 makes a distinct classification. In light of the wide spread publicity surrounding this lawsuit and *its de novo* presence in our judicial system, this court does not find the absence of an express mentioning of the present law suit persuasive enough to ignore the logical rationale in *Kimball.*

Furthermore, defendants have openly admitted that the legislation was enacted in reaction to the suit filed by the city of New Orleans. *(See Memorandum in Support of Peremptory Exceptions of No Right of Action and No Cause of Action,* p. 15). Subsection 2 purposely and directly affects the one and only lawsuit filed against gun manufacturers in the State of Louisiana. Thus, its retroactive application is unconstitutional.

Also, defendants asserted that there is a reasonable basis for distinguishing between the members of the classification. Namely, the preexisting preemption of State law, the need for uniformity of regulation of firearm and the protection of citizens' rights to possess arms for their defense. This court finds these reasons are without merit for the reasons addressed above.

C. §1791.1 is a substantive law and must not be applied retroactively.

The general rule against retroactive application of legislative enactments and its exception, is codified in LA. C.C. art, 6: "In the absence of contrary legislative expression substantive laws apply prospectively only, Procedural and interpretive laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary." Additionally, the Code provides that no statute is retroactive unless it is expressly stated. In *Cole v. Celorex Corp.*, 599 So.2d 1058 (La. 1992), the Court added two additional considerations: 1) whether an express legislative intent regarding retrospective or prospective application, If such intent is expressed, the inquiry ends; 2) if no intent is

expressed, the enactment must be classified accordingly. However, an important exception to this rule exists: even where the legislature has expressed its intent to give a statute retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights. St. *Paul Fire and Marine Ins. Co, v. Smith,* 609 So.2d 809 (La. 1992); *Segura v. Frank,* 630 So.2d 714 (La. 1994); Cole v, *Celotex* Corp. 599 So.2d 1058 (La. 1992).

Section 2 of § 1797.1 states that this Act shall apply " to all claims existing or actions pending on its effective date and all claims arising or action filed on and after its effective date," Based on the test established in *Cole,* our inquiry should end. But, in light of aforementioned reasons, this statute should not be applied retroactively because it will divest the plaintiffs of their vested rights because of its substantive nature.

Substantive laws establishes new rules, rights and duties or change existing ones, while interpretive laws merely establish the meaning the statute had from the time of its enactment. St. *Paul Fire & Marine Ins. Co. v. Smith,* 609 So.2d at 817. The Supreme Court has consistently held that even "where the legislature has expressed its intent to give a substantive law retroactive effect, tile law may not be applied retroactively if it would impair contractual obligations or disturb vested rights." *Segura v, Frank,* 93-1271 (La. 1/14/94) 630 So.2d 714. See e.g. Lou 1, *Haley, 370 So.2d 521* (La. 1979); *Succession of Lambert, 210* La. 636, 28So.2d 1 (1949); *Shreveport Long Leaf Lumber Co. v.* Wilson, 195 La. 8 14, 197 so. 566 (1940).

A comparison between the pre-existing statute, § 1796, and § 1797.1 reveals the latter statute adds new rules because it specifically addresses lawsuits. The former statute only addressed the enactments of an ordinance or regulation which, as established above, is not synonymous with a suit for damages. More importantly, § 1797.1 changed the rights of a political subdivision to bring suit against a firearm manufacturer. Previously, § 1796 did not expressly preempt the right of a political subdivision to bring suit against any firearm manufacturer.

Finally, as established above, plaintiffs have a vested right to bring suit that is secured by its home rule charter and the Louisiana Constitution Article VI, § 4. This legislation divests the City of New Orleans of the right to initiate litigation and changes the pre-existing law and the rights secured therein. Thus, it is unconstitutional.

D. Retroactive Application of §1797.1 would violate the Contract Clause, Bill of Attainder, Fourteenth Amendment of Due Process Clause, and Equal Protection Clause.

Plaintiffs argued that the retroactive application or § 1797.1 would impair its federal and state constitutional rights, Both parties addressed the contract clause, bill of attainder, due process and equal protection issues in their briefs. None of the parties raised the issue of *ex post facto* laws; thus, the court refrains from addressing this issue.

1. The City of New Orleans does not have a right of action under the protections of Article I of federal or state constitutions.

The United States Constitution Art. 1, § 10(l) provides as follows:

> " No state shall...pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts .....
> U.S. Const. Art 1, § I 0(l)

The Supreme Court has described the provisions of U.S. Constitution Article 1, § 10 and Louisiana Constitution Art. 1, § 23 as being "virtually identical" and "substantially equivalent" to federal constitutional provisions. *Rousselle, 633* So.2d at n.9; *Segura v. Frank, 630 So.2d 714* (La. 1994); *Board of Commissioners of Orleans Levee District v. Department of Natural Resources,* 496 So.2d 281 (La. 1986).

Defendants argued that plaintiffs lack standing to assert constitutional claims under Article I of the Louisiana Constitution, due process clause or equal protection clause citing recent Supreme Court cases to support their argument. Their argument is partially correct.

In *Rousselle v, Plaquemines Parish School Board,* 633 So.2d *1235* (La. 1994), the Supreme Court considered the retroactive application of an amendment to teacher tenure laws. Similar to the plaintiffs present claim, the school board contended that the retroactive application impaired its vested contractual rights, Therein, the court held that the state may pass retrospective laws waiving or impairing its own rights or those of its subdivisions, or imposing on its subdivisions new liabilities as long as the

rights of private citizens are not infringed. *Id.* In particular, the Court acknowledged a well settled principle that cannot be ignored: "The inhibitions found in Article 1, 23 of the Constitution are protections for the citizens and not for the state," Id.

Despite this court's opinion regarding the plaintiffs home rule rights, it finds that the City of New Orleans did not have the right to assert the constitutional protections of Article 1, §23, i.e., the Contract Clause and Bill of Attainder. As explained in *Kimball,* these constitutional protections are reserved to private citizens. As a result, plaintiff Keith M. Ignatik has a right of action under these provisions.

As such, there is no need to employ the four step contract clause analysis to determine whether § 1797.1 unconstitutionally impairs its contractual obligations.

2. Retroactive Application of §1797.1 would violate the Due Process Clause of the Fourteenth Amendment and Equal Protection Clause.

The Supreme Court recognized that application of legislative enactments has constitutional implications under the due process and contract clauses of both the United States and Louisiana Constitutions. *Rousselle,* 633 So.2d 1235 at 1244. As established above, the City of New Orleans does not have standing under Article I of United States or Louisiana Constitutions, But, their arguments under the Due Process Clause and Fourteenth Amendment have merit.

Foremost, it is well settled among our courts that "the right to file a damage suit in tort is a vested property right. If we were to give retroactive effect to the amending language of the act there challenged, we would effectively terminate the plaintiff's right and in so doing give an unconstitutional interpretation to the statute." Green *v. Liberty Mutual Ins.* Co,, 3 52 So. 2d 3 66 (La. App. 4" Cir. 1977). The right to file a damage suit in tort is a vested property right protected by the guarantee of due process. Walls *v. American Optical Corp.,* 98-0455 (La. 9/8/99); 740 So.2d 1262, 1263 (La. 1992); Crier v. *Whitecloud,* 496 So.2d 305 308 (La. 19886); *Lott v. Haley,* 370 So.2d 521, 524 (La. 1979). To do so would divest plaintiffs of their fundamental right to have their entire case decided by a trier of fact or jury.

Second, the test required to challenge legislative classification mandates that legislative classification must be rationally related to a legitimate governmental interest. *Manuel v. State,* 692 So.2d 320 (La. 1996); *Department of Agriculture v. Moreno,* 413 U.S. 528, 533 (1973). Defendants cite numerous reasons why the legislature felt this statute furthered legitimate state interests. Arguably, the legislature's interests are relevant. But, the retroactive provision of § 1797.1 breaks the connection, i.e., fails to establish the rational relationship, between the ' statute and the legislature's interests. In effect, the retroactive provision ignores the vested rights of plaintiffs to secure the immediate interests of the defendants, not the state. This is not rational nor is it constitutional.

E. Plaintiff Keith Ignatik has a right of action against defendants.

Defendant manufacturers filed a separate Peremptory Exception of No Right of Action against plaintiff Keith Ignatik on December 7, 1999. This' exception is filed in reaction to this court (under District Court Judge Pro Tern Piper Griffin) granting Ignatik the right to intervene in the present suit. In comparison, Defendants' Memorandum *in Opposition to Motion to Intervene,* filed November 12, 1999, contains virtually the same law and arguments as its Peremptory Exception of No Right of Action. Thus, this court stands behind Judge Griffin's past decision. It is reasonable to assume that if plaintiff was allowed to intervene, the court carefully evaluated plaintiff's right of action under La. Code Civ. Pro. art. 1091 and applied all relevant tests accordingly. This is just a disguised attempt by defendants' to reargue their claims. Thus, defendants' subsequent Peremptory Exception of No Right of Action is moot.

III. PLAINTIFFS HAVE A CAUSE OF ACTION AGAINST MANUFACTURERS AND SELLERS OF FIREARMS UNDER ACT 1299, LOUISIANA RE, VISED STATUTE 9:2800.60.

A. Plaintiffs state a cause of action under prior Louisiana Product Liability law.

The function of an exception of no cause of action is to test legal sufficiency of the petition by determining whether the law affords a remedy on facts alleged in pleading; no evidence may be introduced to support or controvert the objection that the petition fails to state cause of action, and the court accepts well-pleaded allegations of fact

as true. *Everything on Wheels Subaru, Inc; v. Suburu South, Inc. et al,* 616 So.2d 1234 (La. 1993); La. Code Civ. Proc. art. 931.

The burden of demonstrating that there is no cause of action is upon the mover. In deciding the exception of no cause of action, the court must accept all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party. *Owens v.* Martin, *449* So.2d *448* (La. *1984); Darvislle v, Texaco, Inc., 447* So.2d *473* (La. 19S4); *Haskins v. Clary, 346* So.2d *193* (La. 1977). This court, in evaluating the sufficiency of defendants' petition, followed the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief *Haskins v. Clary, 346* So.2d 193 (La. 1977). Accordingly, dismissal is justified only when the allegations of the petition do not have a cause of action, or when its allegations indicate the existence of an affirmative defense that appears clearly on the face of the pleading, *Haskins v. Clary, 346* So.2d *193* (La. *1977); Steeg v, Lawyers, Title Ins.* Corp., *329* So.2d *719* (La. *1976).*

Plaintiffs alleged two causes of action for design defects under La. R.S. § 9*:2800.56* and one cause of action for inadequate warning under La. R.S. § 9:2800.57.

1. Plaintiffs have a cause of action under Louisiana Revised Statute 9:2800.56 for design defects.

Generally, Product Liability Law provides

that a product is unreasonably dangerous in design, if at the time the product left its manufacturer's control there was: 1) an alternate design for the product that was capable of preventing the damage; and 2) the likelihood that the defendants' subsequent Peremptory Exception of No Right of Action is moot.

I. PLAINTIFFS HAVE A CAUSE OF ACTION AGAINST MANUFACTURERS AND SELLERS OF FIREARMS UNDER ACT 1299, LOUISIANA REVISED STATUTE 9:2800.60.

A. Plaintiffs state a cause of action under prior Louisiana Product Liability law.

The function of an exception of no cause of action is to test legal sufficiency of the petition by determining whether the law affords a remedy on facts alleged in pleading; no evidence may be introduced to support or controvert the objection that the petition fails to state cause of action, and the court accepts well-pleaded allegations of fact as true. *Everything on Wheels Subaru, Inc; v. Suburu South, Inc. et al, 616* So.2d. 1234 (La. 1993); La. Code Civ. Proc. art. 931.

The burden of demonstrating that there is no cause of action is upon the mover. In deciding the exception of no cause of action, the court must accept all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party, *Owens v. Marlin, 449* So.2d *448* (La, *1984); Darvisile v, Texaco, Inc.,* 447

So.2d 473 (La. 1984); Haskins v, Clary, 346 So.2d 193 (La. *1977).* This court, in evaluating the sufficiency of defendants' petition, followed the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief *Haskins v. Clary,* 346 So.2d 193 (La. 1977). Accordingly, dismissal is justified only when the allegations of the petition do not have a cause of action, or when its allegations indicate the existence of an affirmative defense that appears clearly on the face of the pleading. *Haskins v. Clary, 346* So.2d 193 (La. *1977); Sieeg v. Lawyers Title Ins.* Corp., 329 So.2d 719 (La. *1976).*

Plaintiffs alleged two causes of action for design defects under La. R.S. § 9:2800.56 and one cause of action for inadequate warning under La. R,S. § 9:2800.57.

1. Plaintiffs have a cause of action under Louisiana Revised Statute 9:2800.56 for design defects.

Generally, Product Liability Law provides that a product is unreasonably dangerous in design, if at the time the product left its manufacturer's control there was: 1) an alternate design for the product that was capable of preventing the damage; and 2) the likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered in

evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product, § 2800.56.

Plaintiffs allege that the defendants' have manufactured firearms unreasonably dangerous in design and that they failed to include safety devices in design. To support their claim, the petition provides examples of alleged specific design defects such as the failure to: 1) prevent firearms from being fired by unauthorized users; 2) alert users that a bullet was in the firing chamber; and 3) prevent firearms from being fired when the ammunition magazine was removed from the firearm. *(See* Plaintiffs *'Petition).*

Based on § 2800.56, before the enactment of § 2800,60, plaintiffs' petition states; a valid cause of action. The facts of the petition clearly support their claim for relief. Based on the applicability of the Product Liability Act as the exclusive theory of recovery against manufacturers of any product, a cause of action existed under § 2800.56.

2. Plaintiffs have a cause of action under Louisiana Revised Statute 9:2800.57 for Inadequate Warning,

Generally, the Product Liability Act governing unreasonably dangerous products because of inadequate warning provides that "a product is unreasonably dangerous because of inadequate warning about the product has not been provided for if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use rea-

sonable care to provide an adequate warning of such characteristic an its danger to users and handlers of the product." La. R.S. 9 § 2800.57.

Based on the language of § 2800.57 before the enactment of § 2800.60, plaintiffs' petition states a valid cause of action to seek relief from defendants' alleged inadequate warning. The Petition states that defendants' allegedly failed to provide adequate warning fo the risks that minors could gain access to guns, how to properly store weapons, that a round may be hidden in the chamber or a pistol, and that pistols could be fired with ammunition in the magazine removed (See Plaintiffs *'Petition).* Based on these facts and applicability of the Product Liability Act as the exclusive theory of recovery against manufacturers of any product, a cause of action existed under § 2800.57.

3. Plaintiffs do not have a cause of action under the Louisiana Product Liability Act for nuisance, fraudulent concealment, unjust enrichment, negligent marketing and distribution, and civil conspiracy.

On September 7, 1999, plaintiffs filed an amended petition alleging additional causes of action such as nuisance, fraudulent concealment, unjust enrichment, negligent marketing and distribution, and civil conspiracy.

While plaintiffs' theories of establishing that defendants' products are defective may be based on negligence or strict liability, they are not viable theories of recovery against a manufacturer. Louisiana law has clearly estab-

lished that the Louisiana Product Liability Act is the exclusive theory of recovery in Louisiana against a manufacturer. *Peterson v. G.H. Bass &* Co., 97-2483, 713 So.2d 806 (La. App. 4th Cir. 5/20/98); *Moore v. Safeway, Inc.,* 700 So.2d 831 (La. App 1st Cir. 11/22/96); *Bernard v. Ferrellgas,* Inc, 689 So.2d 554 (La. App. 3 " 2/5/97); *Ashley v. General Motors Corp.,* 666 So.2d 1320 (La. App. 2 nd Cir. 1/24/96).

Although plaintiffs do not have a cause of action under the Louisiana Product Liability Act, our courts disfavor granting partial no causes of action. *Everything on Wheels v. Suburu South,* 616 So.2d 1234 (La. 1993). Therein, the Supreme Court established the existing rule regarding petitions with more than one theory of recovery:

> "If there are two or more items of damages or theories of recovery which arise out of the operative facts of a single transaction or occurrence, a partial judgment on an exception of no cause of action should not be rendered to dismiss one item of damages or theory of recovery, In such a case, there is truly one cause of action, and a judgment partially maintaining the exception is generally inappropriate." *Everything on Wheels,* 616 So.2d at 1239.

Based on the existing rule, this Court maintains its earlier finding of a cause of action in plaintiffs' favor.

B. The Retroactive Provision of § 9:2800.60 is Unconstitutional.

1. § 2800.60 cannot be applied retroactively because plaintiffs' have a vested right in their cause of action.

As established above, the right to bring litigation is a vested right of plaintiffs guaranteed by their home rule charter and Article VI, § 4. Furthermore, the Louisiana Supreme Court has consistently held that where an injured party has a cause of action, such cause of action is a vested property right which is protected by the guarantee of due process. Walls *v. American Optical Corp.*, 98-0455 (La. 9/8/99); 740 So.2d 1262, 1263 (La. 1992); *Crier v. Whitecloud, 496* So,2d 305 308 (La. 19886); Lott v. *Haley, 370* So.2d 521, 524 (La. *1791).* Thus, "statutes enacted after the acquisition of such a vested property right ... cannot be retroactively applied so as to divest the plaintiff of his vested right in his cause of action because such a retroactive application would contravene the due process guaranties." *Cole v. Celotex* Corp., 599 So.2d 1058 (La. 1992); *Faucheaux v. Alton Ochsner Medical Foundation Hospital and Clinic,* 470 So.2d 878, 879 La. 1985).

Section 2 of § 2800.60 is drafted to specifically eliminate plaintiffs' vested right in this cause of action against defendants manufacturers. Thus, this retroactive provision is unconstitutional and may not be upheld.

2. The Retroactive Provision of § 2800.60 is a Prohibited Special Law.

For similar reasons expressed above, § 2800.60 qualifies as a special law. Article 111, §12 provides, in pertinent

part: "...the legislature shall not pass a local or special law ... (3) concerning any civil or criminal actions Defendants have acknowledged in their briefs that both § 1797.1 and § 2800.60 were adopted retroactively specifically in response to plaintiffs' lawsuit. More importantly, Section 2 of § 2800.60 will directly affect a pending civil action - a prohibited enumerated criteria under Article 111, § 12. The Louisiana Supreme Court has interpreted this provision to prohibit the legislature from passing any laws which affect any particular lawsuit. *Kimball v. Allstate Ins. Co.*, 97-2885, 712 So.2d 46 (La. 4/14/98); *State v. McCue, 141* La. 417, 75 So. 100 (1917). Thus, Section 2 must be recognized as a special law and unconstitutional.

3. §2800.60 is a substantive law and must not be applied retroactively.

As discussed above, a two step analysis must be applied to determine whether the statute should be applied retroactively or prospectively. *Cole v. Culotex,* So.2d 1058 (La. 1992); St. *Paul Fire & Marine Insurance Co. v. Smith, 609* So.2d 809 (La. 1992). Section 2 of § 2800.60 states that it is meant to "clarify the provisions of the Louisiana Product Liability Act, and therefore are remedial in nature and shall apply to all actions or claims pending on or filed after the effective date of this Act." By this express statement of retroactivity alone, jurisprudence mandates that our inquiry ends. However, even where the Legislature has expressed its intent to give a legislative law retroactive effect, the law may not be applied retroactively if it would impair contractual obligations or disturb vested rights, *Keith v. U.S. Fidelity & Guaranty Co.*, 96-2075 (La.

5/9/97); 694 So.2d 180; *Segura,* 630 So2d 714 (La. 1994). In light of aforementioned reasons, this statute should not be applied retroactively because it will divest the plaintiffs of their vested rights because of its substantive nature.

Generally, substantive laws establish new rules, rights and duties or changes existing ones, On the other hand, interpretative laws merely establish the meaning the interpreted statute had from the time of its enactment. *Segura v. Frank,* 630 So,2d 714 (La. 1994). Interpretative laws, do not create new rules, but merely establish the meaning that the interpretative statute and from the time of its enactment. *Gulf Oil Corp. v. Slate Mineral Board, 317* So.2d 576, (La. 1974),

Defendants' argue that, on its face, this statute is interpretative. However, "the suggested distinction between interpretive legislation "clarifying" and substantive legislation "amending or "changing existing" law is an obscure one. *St Paul Fire & Marine Insurance Co. v. Smith,* 609 So.2d 809 (La. 1992), In *Gulf Oil* Corp., the Supreme Court explained that interpretative laws do not create new laws, but merely establish the meaning that the interpreted statute had from the time of its enactment, It is the original statute, not the interpretive one, that establishes the rights and duties. Gulf Oil *Corp. v. State Mineral Board,* 317 So. 2d at 59 1. Thus, following the Court's rationale in *Gulf Oil Corp.,* § 2800.60 cannot be in nature because it seeks to establish new rights for gun manufacturers and seeks to restrict the rights of plaintiffs that clearly existed prior to tile enactment of § 2800.60.

Conversely, the Court's reasoning in *St. Paul Fire & Marine* Ins. Co. governs in this case. Therein, the Supreme Court affirmed the principle that a statute that changes settled law relative to substantive rights only has prospective effect. But, in concluding the amendment of a statute was substantive or legislative, the court noted several significant factors: the enactment of new legislation was a delayed rather than a prompt response to the courts previous interpretations of the statute; the parties relied on the line of jurisprudence interpreting the statute; and that the amendment was part of an overall revision of the workers compensation laws. Id at 821-822; *Segura v. Frank, 630* So.2d 714 (La. 1994). Applying the Court's reasoning in *St Paul Fire & Marine Ins. Co.* and *Segura,,* it becomes evident that § 2800.60 is substantive. Prior to § 2800.60, it was a well settled principle that the Louisiana Product Liability Act was the only theory of recovery available against any manufacturer. As a result, this statute has been unanimously applied to all types of damage suits against a manufacturer without a provision that specifically addressed a particular manufacturer. Furthermore, there is a long line of jurisprudence consistently holding that the Louisiana Product Liability Act is non-retroactive and that it alters substantive rights. *Boh Bros, Construction Co, Inc. v. Luber-Finer, Inc., 612* So.2d 270, (La. App. 4' Cir. 1992); *Delery v. Prudential Ins. Co. of America, 643* So.2d 807 (La. App. 4th Cir. 9/29/94); Gilboy v. *American Tobacco Co., 582* So.2d 1263 (Supp. 1991); *Horton v. Burke, A Div. of Klien Tools, Inc., 926* F.2d 456, C.A. 5 (La.) 1991.

Additionally, the City of New Orleans had to rely on the long line of jurisprudence established based on

the Product Liability Act because it is the exclusive theory of recovery against a manufacturer. Moreover, the enactment of this statute constitutes a step in the dissolution of the unbiased and uniform application of the Product Liability Act to actions against a manufacturer, Consequently, it may well stir up a line of Acts designed to specifically restrict the rights of this State's citizens and legal entities from pursuing lawful and well-founded actions against certain types of manufactures until the Product Liability Act, itself, is just a frame of limitations.

Herein, this court is guided by the Supreme Court's rationale in St *Paul Fire & Marine* Ins. Co. , that "a statute that changes settled law relative to substantive rights only has prospective effect. St *Paul Fire & Marine Ins. Co., 609* So.2d 809 (La. 1992); *Gilboy v. American Tobacco Co.,* 582 So.2d 1263 (La. 1991). Thus, legislation that changes well settled law falls outside of the category of interpretative. *Id.*

C. Retroactive application of § 2800.60 would violate Federal and State Due Process and Equal Protection Rights of Plaintiffs

1. Retroactive application of § 2800.60 would violate plaintiffs due process rights

The Supreme Court has recognized that application of legislative enactments has constitutional implications under the *due process* and contract clauses of both the United States and Louisiana Constitutions. *Rousselle, 633* So.2d *1235* at 1244. As established above, this court believes that

plaintiffs do not have a cause of action under the enumerated provisions of Article 111, §23. But, a cause of action to proceed under this article is reserved to private citizens such as Plaintiff Keith Ignatik.

This court does agree, however, that the retroactive provisions of § 2800.60 violates plaintiffs federal and state due process rights. The right to file a damage suit in tort is a vested property right protected by the guarantee of due process. *Walls v, American Optical Corp.*, 980455 (La. 9/8/99); 740 So.2d 1262, 1263 (La. 1992); *Crier v. Whitecloud,* 496 So.2d 305 308 (La. 19886); Lott v. *Haley,* 370 So.2d 521, 524 (La. 1791). To do so would divest plaintiffs of their fundamental right to have their entire case decided by a trier of fact or jury.

2. Retroactive Application of § 2800.60 would violate Plaintiff Ignatik's Equal Protection Rights

Article 1, § 3 of the Louisiana Constitution provides:

> "No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. "No laws shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliation. Slavery and involuntary servitude are prohibited, except in the latter case as punishment for crime."

The test for determining whether a private individual's equal protection rights has been violated is a whether the statutory classification of individuals is rationally related to a legitimate governmental purpose. Consequently, whenever a person is disadvantaged by such a statutory classification shows that it does not suitable further any appropriate state interest, the courts must decline to enforce that classification. *Pace v, State through Louisiana State Employees Retirement System,* 94-1027, 648 So.2d 13 02 (La. 1/ 17/95). The retroactive provision of § 2800.60 is not rationally related to a legitimate governmental purpose because the classification only affects the present plaintiff and seeks to eliminate his cause of action to file suit for damages.

3. Retroactive application of § 2800.60 would violate constitutionally mandated separation of powers.

Plaintiffs argue that § 2800.60 represents an attempt by the legislature to dictate to this Court how to decide this specific case. The Supreme Court has not resolved the issue of separation of powers as it relates to legislative and judicial branches. But, has instead relied on the principles articulated by Professor Yiannopoulos, an expert in Louisiana legislation, to harmonize the interplay between legislative and judicial action as they arise in cases where interpretive law must be distinguished from substantive law:

> " ... principles of separation of powers does not exclude the authority of the legislature to enact clearly legislative laws...*of course, it is a different matter when the legislature actually amends*

> *previously enacted legislation by laws* designed as interpretative. This again may be an improper exercise of power tending to attribute, contrary to constitutional guarantees, retroactive effect to new legislation." *St Paul Fire & Marine Ins.* Co., 609 So.2d 809, 819 citing Yiannopoulos, *Validity of Patents Covering Navigable Waterbottoms- Act 62 of 1912, Price, Carter and All That,* 32 La. L. Rev. 1, 16 (1971)*; see also Manuel v. Louisiana Sheriff's Risk Management Fund,* 664 So.2d 81 (La. 11/27/95); *Gulf Oil Corp., State Mineral Board,* 317 So.2d 576 (La. 1974). (emphasis added)

This court does not propose to resolve the issue of separation of powers, but follows the Court's reasoning in *St. Paul Fire & Marine Ins. Co. As* discussed above, § 2800.60, although designed as interpretive, is substantive in nature. Its retroactive application amends the Louisiana Product Liability Aet and the rights reserved therein, In effect, the enactment of § 2800.60 may be an improper exercise of power tending to divested plaintiffs' of a valid cause of action.

IV CONCLUSION

For the reasons mentioned above the Peremptory Exception of No Right of Action and No Cause of Action filed by all defendants as they apply to the Mayor Marc H. Morial, The City of New Orleans and Keith Ignatik are hereby DENIED.

READ, RENDERED AND SIGNED ON THIS DAY, FEBRUARY 28,2000

/s/ signed
JUDGE

APPENDIX C

SUPREME COURT OF LOUISIANA

No. 00-CA-1132

MAYOR MARC H. MORIAL, AND THE
CITY OF NEW ORLEANS

V.

SMITH & WESSON CORPORATION, ET AL.

APR 3 2001

ON APPEAL FROM THE
CIVIL DISTRICT COURT FOR
THE PARISH OF ORLEANS
HONORABLE LLOYD J. MEDLEY, JUDGE

KIMBALL, Justice

In 1998, the Mayor and the City of New Orleans filed suit against the firearms industry for damages allegedly suffered by the City related to the manufacture, marketing, promotion, and sale of unreasonably dangerous firearms. Subsequently, the legislature enacted La. R.S. 40:1799, which purports to preclude such suits by abolishing the City's right of action and reserving the authority to bring these suits to the state. The City challenged the constitutionality of the statute on several grounds. For the reasons that follow, we find that La. R.S. 40:1799 may be re-

troactively applied to the City's suit as it was enacted pursuant to a reasonable exercise of the state's police power and that La. R.S. 40:1799 and its retroactivity provision is not a constitutionally prohibited local or special law.

FACTS AND PROCEDURAL HISTORY

On October 30, 1998, plaintiffs, Mayor Marc H. Morial and the City of New Orleans (collectively referred to as the "City"), filed suit against numerous firearms manufacturers, retailers, distributors, and trade associations[1] seeking to recover damages for economic harm suffered by the City "associated with the manufacture, marketing, promotion, and sale of firearms which are unreasonably

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[1] Named as defendants in plaintiffs' original petition are: Smith & Wesson Corp., Sturm, Ruger & Co., Beretta U.S.A., Colt's Manufacturing Co., Glock, Inc., Taurus International Manufacturing, Inc., Sigarms, Inc., Lorcin Engineering Co,, Inc., Bryco Arms, B.L. Jennings, Inc., Phoenix Arms, Davis Industries, Navegar, Inc., d/b/a Intratec, FMJ (a.k.a. "Full Metal Jacket"), Inc., Arms Technology, inc., Cash America Pawn of New Orleans, Magic Money Pawn Shop, New Orleans Pawn Shop, Albert's Jewelry & Loan Pawn, Professional Sports Shop,]tic., American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc. In an amended petition, plaintiffs added the following defendants: Tomkins, PLC, Fabbrica D'Armi Pietro Beretta, SPA, Glock, Gmbh, Forjas Tauras, S.A., Swiss Industrial Group, Browning Arms Co., The Fabrique Nationale Group, Heckler and Koch, Inc., Heckler and Koch, Gmbh, British Aerospace Ltd., Para-Ordnance, Magazine Pawn Shop, Pavenstedt & Pauli, and "one or more presently unidentified corporations doing business in the State of Louisiana which brokers or sells insurance to the defendants in this suit." Several of these defendants were dismissed from this suit by the trial court based on exceptions unrelated to the instant appeal.

dangerous under Louisiana law." Specifically, the City's petition alleges that "[a]ctions by defendants have caused the city to pay out large sums of money to provide services including but not limited to necessary police, medical, and emergency services, health care, police pension benefits and related expenditures, as well as to have lost substantial tax revenues due to lost productivity."

Subsequent to the filing of the City's original petition, the legislature enacted Act 291 of 1999, effective June 11, 1999. Section I of the Act purports to preclude suits from being filed by any political subdivision or local governmental authority against any, firearms or ammunition manufacturer, trade Association, or dealer for damages relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition and reserves this power to the state.[2] Section

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[2]Section I of Act 291 of 1999 enacted La. R. S. 40:1797. 1, which was redesignated as La. R.S. 40:1799 pursuant to the statutory revision authority of the Louisiana State Law Institute. La. R.S. 40:1799 provides:

> A. The governing authority of any political subdivision or local or other governmental authority of the state is precluded and preempted from bringing suit to recover against any firearms or ammunition manufacturer, trade association, or dealer for damages for injury, death, or loss or to seek other injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition. The authority to bring such actions as may be authorized by law shall be reserved exclusively to the state.
>
> B. This Section shall not prohibit the governing authority of a political subdivision or local or other governing authority of the state from bringing an action against a firearms or ammunition manufacturer, trade association, or dealer for breach of contract as to firearms or ammunition purchased by the political subdivision or local authority of the state.

2 of Act 291 provides that its provisions "shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date."

The legislature also enacted Acts 1999, No. 1299, effective July 12, 1999, Which was codified as La. R.S. 9:2800.60. Section I of the Act provides that the Louisiana Products Liability Act was not designed to impose liability on a manufacturer or seller for the improper use of a properly designed and manufactured product, and that the manufacture and sale of firearms and ammunition by duly licensed manufacturers and dealers is lawful activity and is not unreasonably dangerous.[3] Section 2 of Act 1299 states

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[3] La. R.S. 9:2800.60, as enacted by Act 1299 of 1999, provides in its entirety:

> A. The legislature finds and declares that the Louisiana Products Liability Act was not designed to impose liability on a manufacturer or seller for the improper use of a properly designed and manufactured product. The legislature further finds and declares that the manufacture and sale of firearms and ammunition by manufacturers and dealers, duly licensed by the appropriate federal and state authorities, is lawful activity and is not unreasonably dangerous.
>
> B. No firearm manufacturer or seller shall be liable for any injury, damage, or death resulting from any shooting injury by any other person unless the claimant proves and shows that such injury, damage,, or death was proximately caused by the unreasonably dangerous construction or composition of the product as provided in R.S. 9:2800.55.

that its provisions are "intended to clarify the provisions of

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footnote 3 continued

C. Notwithstanding any other provision of law to the contrary, no manufacturer or seller of a, firearm who has transferred that firearm in compliance with federal and state law shall incur any liability for any action of any person who uses a firearm in a manner which is unlawful, negligent, or otherwise inconsistent with the purposes for which it was intended.

D. The failure of a manufacturer or seller to insure that a firearm has a device which would: make the firearm useable only by the lawful owner or authorized user of the firearm; indicate to users that a cartridge is in the chamber of the firearm; or prevent the firearm from firing if the ammunition magazine is removed, shall not make the firearm unreasonably dangerous, unless such device is required by federal or state statute or regulation.

E. (1) For the purposes of this Chapter, the potential of a firearm to cause serious injury, damage, or death as a result of normal function does not constitute a firearm malfunction due to defect in design or manufacture.

(2) A firearm may not be deemed defective in design or manufacture on the basis of its potential to cause serious bodily injury, property damage, or death when discharged legally or illegally.

F. Notwithstanding any provision of law to the contrary, no manufacturer or seller of a firearm shall incur any liability for failing to warn users of the risk that:

(1) A firearm has the potential to cause serious bodily injury, property damage, or death when discharged legally or illegally.

(2) An unauthorized person could gain access to the firearm.

(3) A cartridge may be in the chamber of the firearm.

the Louisiana Products Liability Act, and therefore are remedial in nature and shall apply to all actions or claims pending on or filed after the effective date of this Act."

Subsequent to the effective dates of these Acts, defendants filed peremptory exceptions, contending plaintiffs have no right of action under La. R.S. 40:1799 and no cause of action under La. R.S. 9:2800.60. In response, the City challenged the constitutionality of these statutes on several grounds. Keith Ignatik, an individual and private plaintiff in a pending action filed on July 2, 1999 and captioned *Ignatik Tummarello,* No. 99-1078 1, Civil District Court for the Parish of Orleans, was granted leave to intervene in the City's suit "for the purpose of asserting certain Constitutional rights and making certain constitutional challenges."

After a contradictory hearing, the trial court denied defendants' exceptions, finding that La. R.S. 40:1799 and La. R.S. 9:2800.60 are unconstitutional.[4] Initially addressing defendants' exception of no right of action, the trial court found that Act 291 does not deprive plaintiffs of a right of

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(4) The firearm is capable of being fired even with the ammunition magazine removed.

> G. The provisions of this Section shall not apply to assault weapons manufactured in violation of 18 U.S.C. S. 922(v).

[4] At the hearing, the trial court stated, "Just to keep the record clear, the Attorney General has been notified and has basically said he's not going to participate or appear." The Attorney General has not participated in the instant appeal.

action. First, the trial court found that plaintiffs have a vested right to bring suit under the City's home rule charter and, therefore, La. R.S. 40:1799, enacted by Act 291, cannot be retroactively applied to plaintiffs' suit. The trial court next found that the retroactivity provision of Act 291 is an unconstitutional special law because it implicitly "singles out" the City's pending lawsuit, which is "the one and only lawsuit filed against gun manufacturers in the State of Louisiana." The trial court also concluded that La. R.S. 40:1799 is a substantive law because it changes the rights of a political subdivision to file suit against a firearms manufacturer; therefore, because the legislation divests the City of the right found in its home rule charter to initiate litigation and changes pre-existing law, the trial court found it unconstitutional. Finally, the trial court found that retroactive application of La. R.S, 40:1799 would impair plaintiffs' rights under the United States and Louisiana Constitutions, including their due process and equal protection rights and Mr. Ignatik's right as a private citizen to assert the constitutional protections of the Contracts Clause and the Bill of Attainder Clause.

Turning to defendants' exception of no cause of action, the trial court found that plaintiffs have a cause of action against manufacturers and sellers of firearms in spite of the enactment of La. R.S. 9:2800.60. The trial court reasoned that plaintiffs stated a cause of action for design defects[5] and for inadequate

[5] The design defects alleged by plaintiffs include the absence of a mechanism to:

(1) prevent firearms from being fired by unauthorized users; (2) alert users that a bullet is in the firing chamber; and (3) prevent firearms from being fired when the ammunition magazine was removed from the firearm.

warning[6] under prior Louisiana products liability law. The trial court found that because plaintiffs have a vested right in their cause of action, La. R.S. 9:2800.60 cannot be applied retroactively to divest that right. The trial court further found that La. R.S. 9:2800.60 is an unconstitutional special law and cannot be retroactively applied because it is substantive in nature. Finally, the trial court found that retroactive application of La. R.S. 9:2800.60 would violate constitutionally mandated separation of powers and impair plaintiffs' rights under the United States and Louisiana Constitutions, including their due process and equal protection rights and Mr. Ignatik's right as a private citizen to assert the constitutional protections of the Contracts Clause and the Bill of Attainder Clause.

Defendants have appealed the district court's judgment directly to this court pursuant to La. Const. art. V, §5(D).[7]

LAW AND DISCUSSION

At the outset, we note that defendants have not assigned as error, briefed, or argued the trial court's rulings relating to the rights of the private plaintiff, Keith Ignatik. At oral argument before this court, counsel for defendants

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[6] Defendants allegedly failed to provide an adequate warning for the risks that: (1) minors could gain access to the firearm; (2) a round may be hidden in the chamber of a pistol; and (3) a pistol could be fired when the ammunition magazine is removed. Defendants also allegedly failed to advise consumers how to properly store weapons.

[7] La. Const. art. V, §5(D) provides that a case shall be appealable to this court if "a law or ordinance has been declared unconstitutional."

stated that this appeal did not concern the trial court's ruling with respect to Mr. Ignatik. Therefore, the issues relating to Mr, Ignatik's rights are not before us and nothing in this opinion should be interpreted to affect his rights.

The issue we must first decide is whether La. R.S. 40:1799, which provides that the governing authority of a political subdivision is precluded from bringing suit against firearms or ammunition manufacturers, trade associations, or dealers seeking damages for losses resulting from the lawful design, manufacture, marketing or sale of firearms or ammunition, can be retroactively applied to the City's suit filed prior to its effective date. The City argues that retroactive application of the statute, which was enacted by Act 291, would destroy its vested right to sue defendants and therefore violate its due process rights guaranteed by the Fourteenth Amendment. The City also argues that allowing Act 291 to act as grounds for the dismissal of its suit would violate the federal Equal Protection Clause, the Contract Clause, and the prohibition against bills of attainder. Furthermore, the City contends that retroactive application of the statute would violate its vested right to sue in all matters, a right which sterns from its broad home rule powers. In response, defendants argue that the political subdivisions of the state do not enjoy constitutional protections under Article I of the Louisiana Constitution, or the Due Process and Equal Protections Clauses of the United States Constitution. Defendants assert the state enacted La. R.S. 40:1799 in an exercise of its police power, which is a limitation on the City's home role power. Accordingly, defendants maintain the City lacks a right of action to pursue this suit.

The legislature is free, within constitutional confines, to give its enactments retroactive effect. *St. Paul Fire & Marine Ins. Co. v. Smith, 609* So.2d 809, 816 (La. 1992). A court must defer to the legislature's intent when determining whether a statute should be applied retroactively. La. C.C. art. 6; *Reichert v. State, Dep't of Transp. & Dev., 96-1419, p. 6* (La. *5/20/97), 694* So.2d 193, *199; Stelly v. Overhead Door- Co. of Baton Rouge,* 94-0569, p. 7 (La. 12/8/94), 646 So.2d 905, 911. Civil Code Article 6, entitled "Retroactivity of laws," provides:

> In the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

A related statute, La. R.S. 1:2, provides:

> No Section of the Revised Statutes is retroactive unless it is expressly so stated.

Although this statute may appear to conflict with La. C.C. art. 6, La. R.S. 1:2 has been limited to apply only to substantive and not procedural or interpretive legislation and the two provisions are therefore generally construed as being co-extensive. *Sudwischer v. Estate of Hoffpauir,* 97-0785, p. 8 (La. 12/12/97), 705 So.2d 724, 728; *Keith v. US, Fid & Guar.* Co., 96-2075, p. 5 (La. 5/9/97), 694 So.2d 180, 183; *Manuel v, Louisiana Sheriff's Risk Mgmt. Fund,* 95-0406, p. 8 (La. 11/27/95), 664 So.2d 81, 85; *Stelly v. Overhead* Door Co. of *Baton Rouge,* 94-0569, pp. 6-7 (La. 12/8/94), 646 So.2d 905, 911; *St. Paul Fire & Marine Ins. Co. v. Smith,* 609 So.2d 809, 816 (La. 1992).

Article 6 requires a two-fold inquiry:

> First, we must ascertain whether in the enactment the legislature expressed its intent regarding retrospective or prospective application. If the legislature did so, our inquiry is at an end. If the legislature did not, we Must classify the enactment as substantive, procedural or interpretive.

Cole v. Celotex Corp., 599 So.2d 1058,1063 (La. 1992); *St. Paul Fire & Marine, 609* So.2d at 816. However, because the principle has constitutional implications under the Due Process and Contract Clauses of both the Unites States and Louisiana Constitutions, even where the legislature has expressed its intent to give a law retroactive effect, that law may not be applied retroactively if it would impair contractual obligations or disturb vested rights. *See Keith v. US Fid. & Guar. Co.,* 96-2075, p. 6 (La. 5/9/97), 694 So.2d 180, 183; *Rousselle v. Plaquemines Parish Sch. Bd,* 93-1916, p. 11 (La. 2/28/94), 633 So.2d 1235, 1244; *Segura v. Frank,* 93-1271, pp. 8-9 (La. 1/ 14/94), 630 So.2d 714, 72 1; *St. Paul Fire & Marine,* 609 So.2d at 816 *n. 11; Lott v. Haley,* 370 So.2d 521, 523 (La. 1979). *See also* 2 AN YIANNOPOULOS, LOUISIANA CIVIL LAW TREATISE, § 10(3d ed. 1991) ("Retroactive application of new legislation is constitutionally permissible only if it does not result in impairment of the obligation of contracts or in divestiture of vested rights.").

The first step under Article 6, determining whether the legislature expressly provided for retroactive application, is resolved by examining the specific language con-

tained in the Act. St. *Paul Fire &Marine,* 609 So.2d at 816-17. Act 291 contains a clear and unmistakable expression of legislative intent regarding its intended temporal effect. Section 2 of the Act states that its provisions "shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date." By adopting this Section, the legislature has clearly indicated its intent that this Act be applied both retroactively and prospectively. Because the City's action was pending, *i.e.,* "subject to judicial scrutiny," *see Segura v. Frank, 93-1271* at *p. 19, 630 So.2d* at *727,* on the effective date of the Act, we must conclude that the legislature intended that Act 291 be applied to plaintiffs' claims. Because the legislature plainly intended that Act 291 be retroactively applied, its provisions will be applied to the City's suit unless doing so would violate the constitutional prohibitions against impairment of contractual obligations or disturbance of vested rights.[8]

The legislature's power to enact retroactive laws is limited by the Due Process and Contract Clauses of the Federal and State Constitutions. U.S. Const. Amend. XIV, § 1;

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[8] The Article 6 inquiry is at an end because we can determine the legislature's intent regarding retroactive application of the statute. As we explained in *Bourgeois v. A.P. Green Indus., Inc., 00-1528,* rendered this date, an analysis of whether the Act is substantive, procedural or interpretive would be futile since such a classification would be useful only in determining whether the legislature would have desired only prospective or both prospective and retroactive application of the statute. Because the clear language of Section 2 of the Act unmistakably evidences the legislature's intent that the provisions of La. R.S. 40:1799 be applied both prospectively and retroactively, there is no need to classify the law as substantive, procedural or interpretive.

U.S, Const. Art. 1, § I 0[l]; La. Const. art. 1, *§2,* La. Const. art. *1, § 23. See also Segura,* 93-1271 at p. 19-20, 630 So.2d at 728, and cases cited therein. In the instant case, however, the City, as a political subdivision of the state, is not entitled to assert the protections afforded by these clauses against the retroactive application of La. R.S. 40:1799. Williams v. Mayor *& City Council of Baltimore, 289 U.S. 36,* 40, 53 S.Ct. 431, 432 ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); *Board of Comm'rs of Orleans Levee Dist. v. Department of Natural Resources, 496* So.2d 281, 287 (La. *1986)* (on rehearing) ("Article 1, the Declaration of Rights Article, protects the rights of individuals against unwarrantable government action and does not shield state agencies from laws passed by the people's duly elected representatives."); *State ex rel. Kemp v. Cit)) of Baton Rouge,* 40 So.2d 477, 482 (La. 1949) ("It is the settled jurisprudence that counties and municipalities are creatures of the State, established for the purpose of providing effective government with functions, powers, duties and obligations delegated or imposed by the State and that there is nothing in the Fourteenth Amendment of the Federal Constitution or any other provision of the Constitution of the United States which would prohibit the State from making any change of such functions, powers and obligations."). *See* also *Palomar Pomerado Health Sys. v. Belshe,* 180 F.3d 1104, *1107 (91h* Cir. *1999)* ("[P]olitical subdivisions of a state may not challenge the validity of a state statute in a federal court on federal constitutional grounds."); *Harris v. Angelina* County, Tex., 31 F.3d 331, 338 (5th Cir. 1994) ("[S]tate subdivisions, such as counties

and municipalities, cannot assert constitutional claims in federal court against their creator, the state itself, or other state political subdivisions."); 2 DENNIS JENSEN & GAIL A. O'GRADNEY, MCQUILLIN MUNICIPAL CORPORATIONS §4.17 at 51 (3rd ed. 1996) ("A municipal corporation has no privileges or immunities under the federal Constitution which it may invoke against state legislation affecting it.").

The Contract Clause, Article I, Section 10[11 of the United States Constitution, provides:

> No state shall ... pass any Bill of Attanider, ex post facto Law, or Law impairing the Obligation of Contracts ....

Article 1, Section 23 of the Louisiana Constitution of 1974, provides:

> No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be enacted.

These constitutional provisions are "virtually identical" and "substantially equivalent." *Segura,* 93-1271 at p. 20, 630 So.2d at 728.

In Rousselle v. Plaquemines Parish Sch. Bd, 93-1916 (La. 2/28/94),633 So.2d 1235, this COMA explained that the constitutional prohibitions found in the Contract Clauses of the Federal and State Constitutions do not protect political subdivisions of the state from the passage of retroactive

laws impairing their rights with respect to transactions already passed because these protections are for the benefit of private citizens. In that case, this court considered a retroactive application of an amendment to the teacher tenure laws and its effect on a pre-existing contract between a school principal and a school board. Rouselle, a school principal, sought to have a 1991 amendment to the teacher tenure laws, an amendment which increased his job protection, apply to his 1990 promotional contract with the school board. The court first concluded that, as administrators of public education, school boards are agencies of the state. As such, the school boards must comply with the teacher tenure laws which define the status of Louisiana's public school teachers and outline the procedures a school board must follow to discharge them. After examining the language of the amendment, the court concluded the legislature expressly provided for its retroactive effect. The school board argued against retroactive application, contending retroactive application would unconstitutionally impair its contractual rights. The court rejected this argument and held retroactive application of the amendment was permissible because the school board, as a public agency of the state, was not protected by the constitutional prohibition against impairment of contracts.

The court stated:

> The retroactive application of Act 779 to Rousselle's contract does not unconstitutionally impair the School Board's contractual rights. The School Board is an agency of the state and is aware of the legislature's broad and pervasive power to regulate public education. Accordingly, it is not pro-

> tected by the constitutional prohibition against the legislature enacting laws which impair the obligation of contracts. The inhibitions found in Article 1, § 23 of the Constitution are protections for the citizens and not for the State. This state may Constitionally pass retrospective laws waiving or impairing its own rights or those of its subdivisions or imposing upon itself or its subdivisions new liabilities with respect to transactions already passed, as long as private rights are not infringed. Thus, as the School Board is not protected by the contract clause prohibitions of the state or federal constitutions, there is no need to employ the four-step contract clause analysis to determine whether Act 779 unconstitutionally impairs its contractual obligations.

Id. at 1246-47 (citations and footnotes omitted) (emphasis added). *See also City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1254 (5th Cir. 1976) ("Ever since the Supreme Court's landmark decision in *Dartmouth College v. Woodward, 17* U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), it has been apparent that public entities which are political subdivisions of states do not possess constitutional rights, such as the right to be free from state impairment of contractual obligations, in the same sense as private corporations or individuals."); *Olivedell Planting Co. v. Town of Lake Providence,* 47 So.2d 23, 27 (La. 1950) ("The provisions of our Constitution relating to the impairment of the obligations of contracts only apply to contracts or vested

rights of individuals or private corporations.").[9]

In light of the established principle that the Contract Clauses of the Federal and State Constitutions do not apply to protect municipalities of the state from retroactive legislation, we must conclude that these clauses would not be violated by a retroactive application of La. R.S. 40:1799 in this case. Moreover, the City, as a creature of the state, is not entitled to assert the constitutional prohibition against bills of attainder against its creator.[10] The trial court was therefore correct in concluding that the City does not have the right to assert the constitutional protections of the Contract Clause and the prohibition against bills of attainder.

Similarly, the City, as a political subdivision of the state rather than a "person," is without the protections of La. Const. art. 1, the Declaration of Rights Article, or the Due Process and Equal Protection Clauses of the United States Constitution. The jurisprudence has long held that municipalities are not entitled to Fourteenth Amendment protections. Williams v. *Mayor & City Council* of *Baltimore, supra; Risty v. Chicago, Ry & P. Ry, Co.,* 270 U.S. 378, 390 46 S.Ct. 236, 240 (1926) ("The power of the state and its agencies over municipal corporations within its territory is

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[9] Because the City is not protected by the Contract Clauses found in both the Federal and State Constitutions, we need not utilize the four-step contract clause analysis to determine whether application of the statute at issue to the City's suit impairs its contractual obligations.

[10] Although the City is not to be regarded as a creature of the legislature since its powers and functions are granted directly by the constitution, Francis v. Morial, 455 So.2d 1168, 1173 (La. 1984), it is undeniably a creature of the state.

not restrained by the provisions of the Fourteenth Amendment."); *Warren County, Miss v Hester 54 So 2d 12* 18 (La. 195 1) *cert. denied. 342 U.S.* 877 72 S.Ct. 167(1951) ("[I]t is plain that the Fourteenth Amendment of the Federal Constitution, declaring that no state shall deprive any person of life, liberty or property without due process of law nor deny any person within its jurisdiction the equal protection of the laws, is utterly without application to the political subdivisions of a state, which cannot be viewed as a person within the purview of the constitutional provision."); *State exrel. Kenip v. City of Baton Rouge, 40 So.2d 477* (La. *1949), supra; 2* DENNIS JENSEN & GAIL A. O'GRADNEY, MCQUILLIN MUNICIPAL CORPORATIONS § 4.20 at 60 (3rd ed. 1996) ("Municipal corporations are political subdivisions of the state, created for exercising any governmental powers of the state as may be entrusted to them and they may not assert the protection of the due process clause against action of the state government. "). *See also City of Newark v. New* jersey, 262 U. S. 192, 43 S.Ct. 539 (192 3); City, *of Trenton v. New jersey),,* 262 U. S. 182, 43 S.Ct. 534 (1923); *City of New York v. Richardson,* 473 F.2d 923 (2nd Cir. 1973*); Yonkers Comm'n on Human Rights v. City of Yonkers,* 654 F.Supp. 544 (S.D. N.Y. 1987*); Bartels v. Roussel,* 303 So.2d 833 (La. App. 1 Cir. 1974); *Penny v. Bowden,* 199 So.2d 345 (La. App. 3 Cir. 1967). Correspondingly, Article I of the Louisiana Constitution protects only the rights of "persons" and does not protect government entities against unjust government action. *See Board of Comm'rs, supra.*

The City of New Orleans is not protected by the constitutional prohibitions against impairment of contractual obli-

gations or disturbance of vested rights. Therefore, the retroactive application of La. R.S. 40:1799 to its lawsuit is not precluded by due process or equal protection considerations, the Contract Clauses or the Bill of Attainder Clauses of either the Federal or State Constitution.

The City is not without constitutional protection, however. Although the Declaration of Rights Article of the Louisiana Constitution does not protect government entities against unjust government action, the protection of these entities is provided for in the Local Government Article. *Board of Com'rs, supra.* The Local Government Article, Article V1, gives home rule entities such as the City broad home rule authority by which it has the "freedom and flexibility to manage its own local affairs without undue legislative influence." *Miller v. Oubre*, 96-2022, p. 9 (La. 10/15/96), 682 So.2d 231, 236.

The City of New Orleans is governed by the provisions of a home rule charter enacted prior to the 1974 Louisiana Constitution. These pre-existing home rule charters were continued, and essentially constitutionalized, *City of New Orleans v. Board of Comm'rs of Orleans Levee Dist., 93-0690, p.* 8 (La. 7/5/94), 640 So.2d 237, 1-44, by La. Const. art. VI, §4. This section provides:

> Every home rule charter or plan of government existing or adopted when this constitution is adopted shall remain in effect and may be amended, modified, or repealed as provided therein. Except as inconsistent with this constitution, each local governmental subdivision which has adopted such a home rule charter or plan of government shall retain

> the powers, functions, and duties in effect when this constitution is adopted. If its charter permits, each of them also shall have the right to powers and functions granted to other local governmental subdivisions.

Although "'home rule' does not mean complete autonomy," *Miller v. Oubre*, 96-2022 at p. 9, 682 So.2d at 236, this court has recognized that, in affairs of local concern, a home rule charter government possesses "powers which within its jurisdiction are as broad as that of the state, except when limited by the constitution, laws permitted by the constitution, or its own home rule charter." *Francis v. Morial,* 455 So.2d 1168, 1171 (La. 1984).

Article VI also fosters local self-government by giving home rule entities "the discretion to deploy their powers and functions on the local level, which may not be revoked, changed or affected by law unless necessary to prevent an abridgement of the reasonable exercise of the state's police power." *Id.* La. Const. art. VI, §6 provides:

> The legislature shall enact no law the effect of which changes or affects the structure and organization or the particular distribution and redistribution of the powers and functions of any local governmental subdivision which operates under a home rule charter.

This Section was added to Article VI to protect home rule governments from unwarranted interference in their internal affairs by state government. *Francis,* 455 So.2d at 1171.

To ensure that the powers granted to home rule governments would not be used to deprive the state government of its inherent powers, Section *9(13)* was added to Article VI as a counterbalance. Id. at 1172. This section, entitled "Limitations of Local Government Subdivisions," provides:

> Notwithstanding any provision of this Article, the police power of the state shall never be abridged.

This provision was adopted "as a principle of harmonizing the replete home rule powers granted local governments with a basic residuum of the state's power to initiate legislation and regulation necessary to protect and promote the vital interests of its people as a whole." *City of New Orleans,* 93-0690 at p. 20, 640 So.2d at 249. This section has also been characterized as "a positive reaffirmance of the supremacy of the state's police power." *Lafourche Parish Council v. Autin,* 94-0985, p. 18 (La. 12/9/94), 648 So.2d 343, 357.

Although the police power of the state is best defined on a case by case basis, it has been generally described as the state's "inherent power to govern persons and things, within constitutional limits, for promotion of general health, safety, welfare, and morals." *City of New Orleans v. Board of Directors of Louisiana State Museum, 98-1170,* p. I I (La. *3/2/99),* 739 So.2d 748, 757. *See also Polk v. Edwards,* 626 So.2d 11218, 1142; *Francis,* 455 So.2d at *1172.* The police power extends only to measures that are reasonable. *City) of New Orleans v. Board of Directors of Louisiana State Museum,* 98-1170 at p. 11, 739 So.2d at 757; *Francis,* 455 So.2d at *1172. A* measure taken under the state's police

power is reasonable when the action is, under all the circumstances, reasonably necessary and designed to accomplish a purpose properly falling within the scope of the police power. City *of new Orleans v. Board of Directors of Louisiana State Museum,* 98-1170 at p. *H, 739* So.2d at *757.* Thus, to sustain an action under the state's police power, courts must be able to see that its operation tends in some degree to prevent an offense or evil or otherwise to preserve public health, safety, welfare or morals. *Id.* Further, an exercise of the state's police Power "does not justify an interference with constitutional rights which is entirely out of proportion to any benefit redounding to the public." City of *Baton Rouge v.* Williams, 95-0308, p. 6 (La. 10/16/95), 661 So.2d 445, 449 (quoting *Francis, 455* So.2d at 1173).

In the instant case, defendants argue that La. R.S. 40:1799 was enacted in the interest of public safety and welfare and pursuant to the police power of the state. They reason that the City's suit is therefore barred as an abridgement of the state's police power. We agree.

The City's broad authority under the Home Rule Charter of 1954 and its predecessor, Act 159 of 1912, allows it to "sue and defend, plead and be impleaded, in all courts and places and in all matters and proceedings." It was pursuant to these powers that the City filed the instant lawsuit. As this court has previously recognized, the powers of home rule entities are limited by the police power of the state. *City of Neu) Orleans v. Board of Directors of Louisiana State Museum,* 981170 at p. 12, 739 So.2d at 757. Therefore, under the principles set forth in Article VI as explained above, the City may freely exercise its power to sue in all

matters and proceedings unless this power conflicts with a valid exercise of the state's police powers.

The statute at issue, La. R.S. 40:1799, provides that the governing authority of a political subdivision is precluded and preempted from bringing suit against any firearms or ammunition manufacturers, trade associations, or dealers seeking damages for injury, death, or loss or other injunctive relief resulting from the lawful design, manufacture, marketing, or sale of firearms of ammunition and reserves the authority to bring such actions exclusively to the state. This statute therefore purports to take away any right of action that a political subdivision might have previously had to bring suit against the firearms industry seeking damages or injunctive relief relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition. If La. R.S. 40:1799 is constitutional and applicable to the City's suit, then the plain language of its provisions clearly mandates the dismissal of the City's suit.

It is beyond question that this challenged statute was passed in the interest of the public as a whole and as an exercise of the state's police power. A reading of the legislative history of Act 291 indicates that its provisions were enacted to make it clear that the regulation of firearms is exclusively a state function. *See* Minutes of the Senate Committee on Judiciary A, May 18, 1999, pp. 18-21. Clearly, state regulation of the lawful design, manufacture, marketing, or sale of firearms or ammunition is of vital interest to the citizens of Louisiana. Equally clear is the fact that consistent, exclusive statewide regulation of the firearms industry tends in a great degree to preserve the public safety and welfare. A scheme

allowing several municipalities to file suits effectively attempting to regulate the firearms industry different ways and in different degrees could conceivably threaten the public safety and welfare by resulting in haphazard and inconsistent rules governing firearms Louisiana. Moreover, this court has consistently recognized that the legislature's authority to regulate different aspects of the firearms industry constitutes a legitimate exercise of the police power. *See State v. Sandifer, 95-2226 (La. 9/5/96), 679 So.2d 1324; State v. Hamlin, 497* So.2d *1369* (La. *1986); State v. Amos, 343* So.2d 166 (La. 1977). Considering all the circumstances, we therefore conclude that Act *291 of* 1999 Constitutes a reasonable exercise of the state's police power.

The statute at issue is aimed at suits, such as the one filed by the City in the instant case, that attempt to indirectly regulate the firearms industry on the local level. The petition filed by the City in this case alleges that the City was damaged because defendants' firearms

> are sold without the means to prevent their being fired by unauthorized users, without adequate warnings which would prevent such shootings by alerting users of the risks of handguns and of the importance of proper storage of handguns, and without other safety features and warnings which would prevent shootings by unauthorized users. Defendants distribute their handguns in a manner which affords easy access to unauthorized users including criminals.... At all pertinent times the defendants have been able to manufacture, market, sell and/or promote firearms which prevent shootings by unauthorized users, including firearms which incorporate

> safety devices intended to prevent unauthorized users from firing firearms if and when they come into possession of them. However, defendants have failed to do so.... Defendants were ... aware of safety devices, warnings, and other measures which would prevent and decrease these dangers. Defendants failed to remedy these deficiencies in their handguns, warnings, instructions, promotions and advertising; failed to adequately warn customers of these dangers; and failed to inform customers or distributors or retailers of safety devices and measures which could prevent or decrease these dangers and failed to determine whether safety devices were feasible or effective.

As evidenced by the language in the City's petition, this lawsuit constitutes an indirect attempt to regulate the lawful design, manufacture, marketing and sale of firearms.[11] As

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[11] Defendants argue that La. R.S. 40:1796, a statute effective July 17, 1985, preempted the City's suit at the time it was filed and it was thus unnecessary for the district court to reach the constitutionality of Act 291. La. R.S. 40:1796 provides:

> No governing authority of a political subdivision shall enact after July 15, 1985, any ordinance or regulation more restrictive than state law concerning in any way the sale, purchase, possession, ownership, transfer, transportation, license, or registration of firearms, ammunition, or components of firearms or ammunition; provided, however, that this Section shall not apply to the levy and collection of sales and use taxes, license fees and taxes and permit fees, nor shall it affect the authority of political subdivisions to prohibit the possession of a weapon or firearm in certain commercial establishments and public buildings.

Because neither the plain language nor anything in the legislative history of this statute leads us to conclude that it was intended to apply to lawsuits filed by the governing authority of a political subdivision, we find this contention without merit.

such, it squarely conflicts with a reasonable exercise of the state's police power and must be dismissed on the grounds that the City lacks a right of action to pursue this suit. As explained above, the fact that the statute was enacted subsequent to the filing of the City's suit is of no moment as the City lacks the protections of La. Const. art. 1, the Fourteenth Amendment, and the Contract Clauses of both the Federal and State Constitutions and the continuation of the suit abridges the police power of the state in contravention of La. Const. art. VI, §9(B).

In addition to the constitutional arguments discussed above, the City also argues that the retroactivity provision of Act 291 is unconstitutional on the grounds that it is a prohibited local or special law. We disagree with this argument.

The Louisiana Constitution prohibits the legislature from passing any local or special law which deals with any of the subjects enumerated in La. Const. art. III, § 12(A). The prohibition against these laws "is intended to reflect a policy decision that legislative resources and attention should be concentrated upon matters of general interest, and that purely local matters should be left to local governing authorities." *Kimball v. Allstate* Ms. Co., 97-2885, p. 4 (La. 4/14/98), 712 So.2d 46, 50 (quoting H. Alston Johnson *III, Legislative Process,* 36 La. L. Rev, 549, 549 (La. 1976)). The prohibition against local and special laws, however, is not intended to restrict the legislature's ability to adopt legislation under its police power for the promotion of the health, safety, welfare and morals of the citizens of the state. *Polk* v. *Edwards,* 626 So.2d 1128, 1136 (La. 1993). An analysis of whether a statute constitutes an unconstitutional

local or special law begins with a determination of whether the law is, in fact, local or special. *Kimball,* 97-2885 at p. 4, 712 So.2d at 50. If it is, then only then must we decide whether the law concerns a subject listed in La. Const. art. 111, § 12(A). *M.; Polk,* 626 So.2d at 1133 ('[I]f the legislation is general rather than local or special, neither the prohibitions regarding the enumerated subjects nor the reqUirement for local advertisement apply.").

A law is local if it operates only in a particular locality or area without the possibility of extending its coverage to other localities or areas should the requisite criteria exist or come to exist in the new locality or area. *State v. Brazley,* 00-0923, p. 4 (La. 11 /28/00), 773 So.2d 718, 72 1; *Kimball,* 97-2885 at p. 4, 712 So.2d at 51. Thus, a law is general, and not local, if its operation can extend to the whole territory of the state. *Kimball,* 97-2885 at p. 4, 712 So.2d at 5 1. Additionally, a law is not local even though its enforcement may be restricted to a particular locality or area where the conditions under which it operates simply do not exist in other localities. *Kimball,* 97-2885 at p. 5, 712 So.2d at 51 (citing City *of New Orleans v. Treen,* 431 So.2d 390, 394 (La. 1983) ("[A] law may be a general law even though limited to one locality if it is general in its terms and its coverage can extend to other areas should the requisite criteria exist there as well or if its operation is limited to a locality through the effect of a reasonable classification such as population, size or physical characteristics and not solely through the specific designation of a certain parish or parishes.")). Furthermore, a law whose application and immediate effect is restricted to a particular locality is not local if it affects persons throughout the state or operates on

a subject in which the people at large are interested. Id.; *Livingston Downs Racing Ass'n, Inc. v. State, 96-2890, p. 12 (La. 12/2/97), 705 So.2d 149, 156; Louisiana Paddlewheels v. Louisiana Riverboat Gaming Comm'n,* 94-2015, p. 7 (La. 11/30/94), 646 So.2d 885, 889; Polk, 626 So.2d at 1134. A law is special if it operates upon and affects only a fraction of the persons or a portion of the property encompassed by a classification, granting privileges to some while denying them to others. *Kimball, 97* 2885 at p. 6, 712 So.2d at 52. In contrast to a law that is local or special, a law that is general operates equally and uniformly upon all reasons brought within its confines or operates equally upon all of a designated class which has been founded upon a reasonable classification. *Id.*

Applying the above principles, we conclude that both Section I and Section 2 of Act 1-91 operate as general laws rather than local or special laws. Section 1, which comprises the text of La. R.S. 40:1799, is not a local law as its operation extends to the governing authorities of all political subdivisions. Additionally, this section operates on a subject in which the people at large are interested and it is therefore not a local law. Similarly, Section I is not a special law since it affects all the local governing units of the state without granting privileges to some while denying them to others. Section I is clearly a general law as it operates equally throughout the state upon all political subdivisions wishing to file suit against the firearms industry.

Section 2 of the Act deals with retroactivity and provides that its provisions shall be applicable to all claims existing or actions pending on its effective date and all claims aris-

ing or actions filed on and after its effective date. Like Section 1, Section 2 operates as a general law as it operates uniformly upon all local governing units that desire to file suits contemplated by La. R.S. 40:1799. This section is not a local law because, by its very terms, it applies to all localities in the state who have pending actions that are now subject to exceptions of no right of action pursuant to La. R.S. 40:1799. The fact that the City is the only political subdivision that has a lawsuit of this type pending against the firearms industry does not make Section 2 a local law since the conditions upon which Section 2 operates, all governing authorities of a political subdivision that have actions pending on the effective date of the Act, simply do not prevail in other localities. Moreover, Section 2 is not a special law because its privileges and concomitant restrictions affect every entity within its classification, political subdivisions with pending suits against firearms or ammunition manufacturers, trade associations or dealers, equally. Every political Subdivision that had a suit similar to that of the City's pending on the effective date of Act 291 is subject to the provisions of La. R.S. 40:1799. Again, the fact that the City is the only political subdivision with such a pending suit does not make the law a special one since the disabilities or burdensome conditions imposed by Section 2 apply equally to all political subdivisions and that classification is reasonable. Furthermore, that Section 2 is a general law is also supported by the fact that it operates on a subject in which the people at large are interested. This conclusion is also buttressed by the fact that the prohibition against local or special laws is not intended to restrict the legislature's exercise of its police power.

Finally, the City argues that application of Act 291 as a basis for sustaining defendants' exception of no right of action violates the constitutional principle of separation of powers. We reject the City's argument that, in enacting Act 291, the legislature exercised power properly belonging to the judicial branch of government. The legislature has always enjoyed the power to create new rights and abolish old ones as long as it does not interfere with vested rights. *See, e.g., Reeder v. North,* 97 0239, p. 9 (La. I 0/21/97), 701 So.2d 1291, 1296; *Crier v. Whitecloud,* 496 So.2d 305, 310 (La. 1986). As we have already explained, the legislature's decision to abolish a political subdivision's right of action to sue firearms or ammunition manufacturers, trade associations or dealers for damages or injunctive relief resulting from or relating to the lawful design, manufacture, marketing, or sale of firearms or ammunition did not interfere with any vested rights belonging to the City. As such, the legislature acted entirely within its province when it enacted the law at issue.

For all of the foregoing reasons, we conclude the district court erroneously declared La. R.S. 40:1799 unconstitutional as applied to the City's suit. The defendants' exception of no right of action should have been sustained and, because the grounds of defendants' objection pleaded by the peremptory exception of no right of action cannot be removed by amendment of the petition, plaintiffs' suit should be dismissed. In light of this court's conclusion that the City is without a right of action to pursue this suit, we need not address the constitutionality of Act 1299 of 1999, codified as La. R.S. 9:2800.60. The district court's declaration of unconstitutionality as to this statute as it affects the

rights of the City is therefore vacated.

DECREE

For the reasons explained above, defendants' exception of no right of action is sustained and plaintiffs' action is dismissed. The district court's conclusion as to the constitutionality of La. R.S. 40:1799 is reversed. The district court's conclusion relating to defendants' exception of no cause of action and the constitutionality of La. R.S. 9:2800.60 is vacated and set aside.

REVERSED IN PART; VACATED IN PART; and RENDERED.

A-99

SUPREME COURT OF LOUISIANA

No. 00-CA-1132

MAYOR MARC H. MORIAL, AND THE CITY OF NEW ORLEANS

V.

SM11TH & WESSON CORPORATION, ET AL

APR 3 2001

ON APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS HONORABLE LLOYD J. MEDLEY, JUDGE

CALOGERO, Chief Justice, dissenting.

I dissent from the majority's conclusion that continuation of the City's lawsuit abridges the police power of the state in contravention of La. Const. art. VI, § 9(B). The majority reaches this result by concluding that the City's lawsuit is an indirect attempt to regulate the lawful design, manufacture, marketing and sale of firearms. Further, the majority concludes that 1999 La, Acts 291 (hereinafter "Act 291 ") was passed as a valid exercise of the state's police power to make it clear that regulation of firearms is exclusively a state function. I disagree with both conclusions.

First, the City's lawsuit does not attempt in any way

to regulate the firearms industry. It is merely a suit for damages. To conclude otherwise would be to say that an injured plaintiff is attempting to regulate the automobile industry when he sues to recover damages caused by faulty brakes, or that a survivor is attempting to regulate the airline industry when he sues the airline because his spouse was killed in an airplane crash. The City does not request any relief in the form of a mandatory injunction that would require gun manufacturers to change their way of doing business; rather, the City is ostensibly only seeking damages in accordance with causes or action created by products liability statutes in existence at the time the lawsuit was filed.

According to *Black's Law Dictionary,* Fourth Edition (1968), to "regulate" means "to fix, establish or control" or "to direct by rule or restriction." The City's lawsuit does neither. The City's goal is the collection of monies to compensate it for damages resulting from the actions of defendants — nothing more, nothing less.

Second, Act 291 is not a valid exercise of the state's police power sufficient to trump the City's powers enumerated in its Home Rule Charter, which pre-dated the La. Constitution of 1974. For the same reasons stated above, Act 291 is not an attempt to regulate the firearms industry (which likely is within the state's police power), but rather is only a legislative assertion of who has the right of action to sue for damages in certain cases. Act 291 was not passed in response to a pressing public need or a vital public interest. Rather, it was passed in response to the City's lawsuit with the obvious intent to halt the City's litigation.

Even if Act 291 constituted a "regulation," it does not rise to the level of a valid exercise of the state's police power sufficient to override the powers granted to the City of New Orleans in its Home Rule Charter, which pre-dated the 1974 Louisiana Constitution. In *City of New Orleans v. Bd of Com'rs of Orleans Levee Dist.*, 93-0690, p. 27 (La. 7/5/94), 640 So. 2d 237, 252, we discussed the state-local government relationship contemplated by Article VI of the La. Const. of 1974, which "strikes a balance in favor of home rule that calls for a corresponding adjustment in judicial attitude." We went on to caution that "home rule abilities and immunities are to be broadly construed, and any claimed exception to them must be given careful scrutiny by the courts." Id. at 252. Act 291 as a claimed exception to the powers of the City's Home Rule Charter does not pass the careful scrutiny that is required in this case.

While the state's police powers are admittedly broad, they are limited to such measures as are reasonable." City *of New Orleans v. Bd of Dir. of LSM, 98-1170, p.* I I (La. 3/2/99), 739 So2d 748, 757. In determining what is reasonable, we have held that "the action taken must be, under all the circumstances reasonably necessary and designed to accomplish a purpose properly falling within the scope of police power." Accordingly, "to sustain an action under the police power, the court must be able to see that its operation tends in some degree to prevent an offense or evil or otherwise to preserve public health, safety, welfare or morals." Id. at *757, Francis v. Morial,* 455 So. 2d 1168, 1173 (La. 1984). The first question to be answered in determining whether the state police power has been abridged by a home rule municipality's local law is whether the local

law conflicts with an act of the state legislature that is necessary to protect the "vital interest" of the state as a whole. City of *Baton Rouge* v. Williams, 95-03 08, pp. 5-6 (La. 10/16/95), 661 So. 2d 445, 449; City *of New Orleans v. Bd of Com'rs, supra.*

I simply do not see where the State, in reserving for itself the exclusive right to recover against the firearms industry for damages for injury, death, or loss, is attempting to prevent an offense or evil or is attempting to preserve public health, safety, welfare or morals. I also do not agree that the Legislature acted to protect a vital interest of the state. In fact, quite the opposite could be argued in that the State is in effect hurting the public welfare by restricting the public's right to recover damages for injuries resulting from the act of another, as well as cloaking an entire industry with immunity from suit by certain plaintiffs.

I acknowledge that these conclusions leave unanswered a myriad of legal issues raised in this litigation. However, as I write as a dissenter and not as a member of the majority, I choose to pretermit the remaining legal issues raised by my conclusions, such as the effect of 1999 La. Acts 1299 (La. R.S. 9:2800.60) on the City's lawsuit.

SUPREME COURT OF LOUISIANA

No.00-CA-1132

APR 3 2001

MAYOR MARC H. MORIAL AND THE CITY OF NEW ORLEANS

Versus

SMITH & WESSON CORPORATION ET AL.

LEMMON, J., Concurring
Exercise of Police Power

Although agreeing with the majority in the dismissal of the action on the exception of no right of action, I also agree with the dissenters that La. Acts 1999, No. 29 1, enacting La. Rev. Stat. 40:1799 (after the filing of the suit at issue), was not a regulation of firearms, but was a regulation of tort actions, and did not constitute the exercise of the police power of the state.

La. Rev. Stat. 40:1796, enacted in 1985 (before the filing of the suit at issue), did regulate firearms by preempting local governments from enacting any legislation or regulation, concerning the sale, purchase, possession, ownership, transfer, transportation, license or registration of firearms, that was more restrictive than state law. The 1998 suit by the City did not violate Section 1796, because the suit was not an ordinance or a rule or regulation concerning

firearms. The suit was an action for tort damages caused to the City by the defendants' allegedly negligent design or manufacture of firearms.

The 1998 suit would have violated Section 1799, if it had been in effect when the suit was filed. However, Section 1799 was not intended to regulate any aspect of the sale, purchase, possession, ownership, transfer, transportation, license or registration of firearms. Section 1799 was clearly a regulation of certain tort suits by limiting the persons and entities who can recover damages. The Act legislatively removed from local governments the right to file suit for damages caused by the negligent design and manufacture of firearms, while reserving to the state the right to sue for such damages).[1]

This new legislation that preempted local governments of their right of action to file certain types of tort suits was a policy decision to set limits and define the scope of liability in such actions Just as the legislative limitation of the right of action to certain persons in the recovery of wrongful death damages under La. Civ. Code art. 23 15.1 Was a policy decision. The policy decision in Section 1799 was perhaps designed to strike a balance in the filing of such actions, without which many questions regarding proper party plaintiffs may have arisen, but the policy decision to preempt the field clearly was not the exercise of police power to promote the general public health, safety, welfare

[1] Contrary to defendants' argument, a decision by this court in the present action finding negligence in the design or manufacture of certain firearms would apply uniformly throughout the state and would not vary from parish to parish, even though only one city brought this action.

and morals or to protect and promote the vital interests of the people as a whole.

Effect on Pending Litigation

The issue in this suit is the effect of the Act 291 on pending litigation. In this respect, but for different reasons, I concur in the majority's result that Act 291 validly removed the City's right of action to recover this type of damages.

The majority reasoned that the Legislature intended Act 291 to apply to actions pending on the effective date; that a political subdivision of the state is not entitled to the protections of the Contracts and Due Process Clauses of the federal and state constitutions afforded to private citizens; that the City, as a home rule charter government existing at the time of the adoption of the 1974 Constitution, nevertheless, retained its existing powers, functions and duties under La. Const. art. V1, §4 which may not be changed by state law unless necessary in the exercise of the state's police power; [2] and that Act 291 was a valid exercise of that police power.

I would not reach the police power issue because I disagree with the application in this case of La. Const. art. V1, §4, as broadly interpreted in City of New Orleans v. Board of Commr's of Orleans Levee Dist., 93-0690 (La. 7/5/94), 640 So. 2d 237 (a decision in which I did not

[2] If this suit had been filed by a local government with a home rule charter adopted after 1974, the exercise of police power would not be an issue.

participate)[3]. La. Const. art. V1, §4 does not, in my view, universally prohibit the Louisiana Legislature from preempting the powers of local government except in the exercise of the state's police power.

The purpose of Article VI was best stated in R. Gordon Kean, Jr., Local Government and Home Rule, 21 Loy.L.Rev. 63, 66 (1975), as follows:

> Municipalities and other local governmental units are, of course, an integral pail of state government. "Home rule" does not mean complete autonomy it should be more properly viewed as a rule by which local goVernment has the freedom and flexibility to manage its own local affairs without undue legislative interference. In matters of true state wide concern and in matters of private or civil relationships. the state should be supreme. The "home rule" provisions of Article VI were designed with this in mind; therefore, these provisions do not go as far in granting home rule powers as some might have preferred. They do not place the substantive powers and functions of local government beyond legislative control through general law. Article VI does not create separate city-states; it does, however, afford the means by which home rule charter unit may exercise any necessary power or function except as may be expressly limited by its charter and the general laws, or as may be inconsistent with other provisions of the Constitution. With regard to "structure and

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[3] That decision involved the issue of the power of the City of New Orleans to institute legislation restricting the zoning and use of land owned by the state. That decision did not involve the City's immunity from legislative control.

> organization", the home rule charter unit is supreme, as it should be. Thus, the concept embodied in Article VI completely reversed the theory of local government as a "creature of the state" with only delegated authority. The old strict constructionist theory is also replaced by one which recognizes that so long as the Legislature does not deny a power, local government possesses it, thereby rendering any further enabling legislation unnecessary. (emphasis added).

Article VI granted all local governments with home rule charters the right, without seeking legislative authority, to manage their own affairs in any manner which is not inconsistent with the Constitution or with the charter itself, and which is not limited by general law. Section 4 of Article VI specifically reserved to local governments with home rule charters adopted before the 1974 Constitution the right to retain their existing powers, functions and duties. The purpose of that provision, however, was to continue the substantive authority of such local governments, while according them the additional powers granted to other local governments under the 1974 Constitution. Kean at 67. That provision was not intended to guarantee to those local governments with preexisting charters that there would be no interference by the Legislature, particularly in matters of statewide concern.

The broad right granted to the City of New Orleans by its Charter to "sue and defend, plead and be impleaded, in all courts and places . . . in all matters and proceedings" did not give the City an unconditional right to sue for damages, arising from injuries to numerous citizens domiciled

throughout the state, which were indirectly incurred by the City as well as by all other municipalities and parishes and by the state. In this type of action involving a matter or statewide concern and an interest shared with other local governments and the state, the state necessarily has the right to preempt political subdivisions as the proper party to bring such an action. Act 291 merely codifies this preemption (although it does not regulate firearms).

The Legislature had the inherent power, within constitutional limits, to determine which parties should have a right of action to sue for this type of damages and may preempt the power of local governments to file this type of action by reserving that right to the state. Accordingly, Act 291 (even if not an exercise of police power) validly preempted the City's powers and could do so with respect to pending suits, because the City does not enjoy the protections afforded to private citizens by the Due Process and Contracts Clauses of the federal and state constitutions.

APPENDIX D

Regular Session, 1999 **ENROLLED**

HOUSE BILL NO. 1094

BY REPRESENTATIVES MCMAINS, DEWITT, DOWNER, SCALISE, FRUGE, JOHNS, VITTER, WALSWORTH. WIGGINS, ALEXANDER, BRUCE. CLARKSON, CRANE, DOERGE, DONELON, FLAVIN, FRITH, GAUTREAUX HEBERT, HOPKINS, JENKINS, KENNARD, KENNEY, LANCASTER, MCDONALD, MICHOT, PERKINS, POWELL, ROMERO, SHAW, JACK SMITH, STELLY, WADDELL, AND WOOTEN AND SENATORS DARDENNE, EWING, HAINKEL, BARHAM, AND SCHEDLER

AN ACT

To enact R.S. 40:1797.1, relative to civil liability; to provide relative to the authority of political subdivisions or local or other governmental authorities of the state to bring suit against firearms and ammunition manufacturers, trade associations, and dealers; to provide for the authority of the state to file certain actions against firearms and ammunition manufacturers, trade associations, and dealers; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

Section 1. R.S. 40:1797.1 is hereby enacted to read as follows:

§1797.1. Preemption of state law., liability of manufacturer trade association or dealer of firearms and ammunition

A. The governing authority of any political subdivision or local or other governmental authority of the state is precluded and preempted from bringing suit to recover against any firearms or ammunition manufacturer, trade association, or dealer for damages for injury, death or loss or to seek other injunctive relief resulting from or relating to the lawful design manufacture marketing or sale of firearms or ammunition The authority to bring such actions as may be authorizeded by law shall he reserved exclusively to the state,

B. This Section shall not prohibit the governing authority of a political subdivision or local or other governing authority of the state from bringing an action against a firearms or ammunition manufacturer, trade association, or dealer for breach of contract as to firearms or ammunition purchased by the political subdivision or local authority of the state.

Section 2. The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on and after its effective date.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor, upon expiration of the time for bills to become law without signature by the governor, as provided in Article 111, Section 18 of the Constitution of Louisiana. If vetoed by the

governor and subsequently approved by the legislature, this Act shall become effective on the day following such approval.

_____

SPEAKER OF THE HOUSE OF REPRESENTATIVES

_____

PRESIDENT OF THE SENATE

_____

GOVERNOR OF THE STATE Of LOUISIANA

APPROVED: _____

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

APPENDIX E

Regular Session, 1999

HOUSE BILL NO. 1639

ENROLLED **EXHIBIT B**

BY REPRESENTATIVES SCALISE, MCMAINS, DEWITT, DOWNER, BRUNEAU, CLARKSON, D= FLAVIN, HEBERT, HILL, HOPKINS, JOHNS, PERKINS, SHAW, STELLY, WIGGINS, BARTON, BOWLER, CRANE, FONTENOT, FRUGE, KENNEY, LANCASTER, MCCALLUM, MCDONALD, POWELL, THOMPSON, THORNHILL, TRICHE, VITTER, WALSWORTH, WRIGHT, BRUNEAU, DONELON, FLAVIN, FRITH, JENKINS, KENNARD, MCMAINS, AND SCHNEIDER AND SENATORS DARDENNE, EWING, HAINKEL, BARHAM, SCHEDLER, ELLINGTON, HOLLIS, MALONE, ROMERO, SIRACUSA, SMITH, THOMAS, BEAN, BRANCH, AND DEAN

AN ACT

To enact R.S. 9:2800.60, relative to civil liability, to provide with respect to liability for manufacturers and sellers of firearms; and to provide for related matters.

Be it enacted by the Legislature of Louisiana:

CODING: Words in ~~struck through~~ type are deletions from existing law; words underscored are additions.

Section 1. R.S. 9:2800.60 is hereby enacted to read as follows:

§2800.60. Liability of Manufacturers and sellers of firearms

A. The legislature finds and declares that the Louisiana Products Liability Act was not designed to impose liability on a manufacturer or seller for the improper use of a properly designed and manufactured product. The legislature further finds and declares that the manufacture and sale of firearms and ammunition by manufacturers and dealers, duly licensed by the appropriate federal and state authorities, is lawful activity and is not unreasonably dangerous.

B. No firearm manufacturer or seller shall be liable for any injury, damage, or death resulting from any shooting injury any other person unless the claimant proves and shows that such injury, damage, or death was proximately caused by the unreasonably dangerous construction or composition of the product as provided in R.S. 9:2800.55.

C. Notwithstanding any other provision of law to the contrary, no manufacturer or seller of a firearm who has transferred that firearm in compliance with federal and state law shall incur any liability for any action of any person who uses a firearm in a manner Which is unlawful, negligent, or otherwise inconsistent with the purposes for which it was intended.

D. The failure of a manufacturer or seller to insure that a firearm has a device which would: (1) make the firearm useable only by the lawful owner or authorized user of the firearm : (2) indicate to users that a cartridge is in the chamber of the firearm: or (3) prevent the firearm from firing if the ammunition magazine is removed, shall not make the firearm unreasonably dangerous. unless such device is required by federal or state statute or regulation.

E. (l) For the purposes of this Chapter, the potential of a firearm to cause serious injury, damage, or death as a result of normal function does no constitute a firearm malfunction due to defect in design or manufacture.

(2) A firearm may not be deemed defective in design or manufacture on the basis of its potential to cause serious bodily injury, property damage or death when discharged legally or illegally.

F. Notwithstanding any provision of law to the contrary, no manufacturer or seller of a firearm shall incur any liability for failing to warm users of the risk that: (1) a firearm has the potential to cause serious bodily injury, property damage or death when discharged legally or illegally (2) an unauthorized person could gain access to the firearm: (3) a

cartridge may be in the chamber of the firearm; or (4) the firearm is capable of being fired even with the ammunition magazine removed.

G. The provisions of this Section shall not apply to assault weapons manufactured in violation of 18 U.S.C. §922(v).

Section 2. The provisions of this Section are intended to clarify the provisions of the Louisiana Products Liability Act, and therefore are remedial in nature and shall apply to all actions or claims pending on or filed after the effective date of this Act.

Section 3. This Act shall become effective upon signature by the governor or, if not signed by the governor upon expiration of the time for bills to become law without signature by the governor, as provided in Article III, Section 18 of the Constitution of Louisiana. If vetoed by the governor and subsequently approved by the legislature, this Act shall become effective on the day following approval.

_____

SPEAKER OF THE HOUSE OF REPRESENTATIVES

_____

PRESIDENT OF THE SENATE

_____

GOVERNOR OF THE STATE Of LOUISIANA

APPROVED: _____

Supreme Court, U.S.
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CLERK

No. 01-181

In the
Supreme Court of the United States

MAYOR MARC H. MORIAL and
THE CITY OF NEW ORLEANS,
Petitioners,

v.

SMITH & WESSON CORP., et al.,
Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Louisiana

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents respectfully submit this Corporate Disclosure Statement.

Respondent Sturm, Ruger & Company, Inc. is publicly traded on the NYSE and has no parent company or subsidiaries. No publicly held company owns 10% or more of the corporation's stock.

Respondent Glock, Inc. is a privately held corporation. No publicly held company owns 10% or more of the corporation's stock.

The parent corporation of Respondent Beretta U.S.A. Corp. is Beretta Holdings, S.p.A. No publicly held company owns 10% or more of the corporation's stock.

Respondent Smith & Wesson Corp. is a wholly-owned subsidiary of Saf-T-Hammer Corporation, which has publicly held securities.

The parent company of Respondent Taurus International Manufacturing, Inc. is Taurus Holdings, Inc. No publicly held company owns 10% or more of the corporation's stock.

Respondent Forjas Taurus, S.A. has no parent company and there is no publicly held company that owns 10% percent or more of the corporation. It is publicly traded.

Respondent Colt's Manufacturing Company, Inc. does not have a parent corporation. No publicly held company owns 10% or more of the company's stock.

Respondent Arms Technology, Inc. is a privately held corporation. No publicly held company owns 10% or more of the corporation's stock.

Respondent Sigarms, Inc. is a privately held corporation. No publicly held company owns 10% or more of the corporation's stock.

Respondent Phoenix Arms is a privately held company and has no parent corporation. No publicly held company owns 10% or more of the company's stock.

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Respondents Sturm, Ruger & Company, Inc., Glock, Inc., Beretta U.S.A. Corp., Smith & Wesson Corp., Taurus International Manufacturing, Inc., Forjas Taurus, S.A., Colt's Manufacturing Company, Inc., Arms Technology, Inc., Sigarms, Inc. and Phoenix Arms request that this Court deny the Petition for Certiorari ("Pet.") filed by Mayor Marc H. Morial and the City of New Orleans, seeking review of the decision of the Supreme Court of Louisiana entered in this case on April 3, 2001.

COUNTER-STATEMENT OF THE CASE

For over one hundred years, the State of Louisiana has regulated the design, possession, distribution and use of firearms pursuant to its police powers.[1] To ensure that these important matters were regulated in a centralized, uniform manner throughout the State of Louisiana, the Louisiana Legislature enacted La. R.S. 40:1796 in 1985, a statute reserving to the State, rather than its political subdivisions, the regulation of firearms.

On October 30, 1998, the City of New Orleans filed the instant lawsuit in an effort to accomplish through litigation regulatory goals it could not accomplish by ordinance. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1, 6, 16 (La. 2001) (Pet. App. at A-69-70, A-91). Specifically, New Orleans sought to force alterations in the federally and state regulated system of firearm manufacture and distribution. *Id.* at 16 (Pet. App. at A-91). The City of New Orleans attempted to justify its lawsuit by citing its status as a home

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[1] *See, e.g., State v. Smith*, 11 La. Ann. 633 (La. 1856); *State v. Amos*, 343 So. 2d 166, 168 (La. 1977); *State v. Sandifer*, 679 So. 2d 1324 (La. 1996).

rule municipality, pursuant to which it possesses certain rights under the Louisiana Constitution. *See, e.g., City of New Orleans v. Bd. of Comm'rs*, 640 So. 2d 237, 246 (La. 1994). However, this municipal independence is tempered by the Louisiana Constitution, Article VI, § 9(B), which provides that "[n]otwithstanding any provision of [the home rule powers] Article, the police power of the state shall never be abridged." *See also City of New Orleans v. Bd. of Directors, State Museum*, 739 So. 2d 748 (La. 1999).

Without question, the City's lawsuit here threatened the State of Louisiana's exercise of its police powers in maintaining uniform, centralized control over the regulation of firearms within the State. By virtue of the nature of the claims and the relief sought, this suit presented the very real likelihood of a geographic patchwork quilt of firearm regulation in Louisiana, with requirements for firearm design and distribution differing from one city and parish to another.

To protect the uniformity of firearm regulation across the State, a component of its police powers, the Louisiana Legislature passed and the Governor signed a bill enacting La. R.S. 40:1799 on June 11, 1999. As the Supreme Court of Louisiana explained in this case, uniformity of regulation was a major concern prompting the Louisiana Legislature to enact La. 40:1799:

> A scheme allowing several municipalities to file suits effectively attempting to regulate the firearms industry in different ways and in different degrees could conceivably threaten the public safety and welfare by resulting in haphazard and inconsistent rules governing firearms in Louisiana.

785 So. 2d at 16 (Pet. App. at A-90-91). La. R.S. 40:1799 provides that all political subdivisions in Louisiana are precluded and preempted from bringing lawsuits against firearm manufacturers based on the lawful design, manufacture, marketing or sale of firearms, expressly reserving the power to bring such suits to the State.[2] The statute applies both prospectively and retroactively to pending lawsuits.[3]

The Manufacturer Defendants filed peremptory exceptions of no right of action,[4] arguing that retroactive application of La. R.S. 40:1799 barred the City's suit. *Morial*, 785 So. 2d at 7-8 (Pet. App. at A-73). The trial court overruled Defendants' exceptions, finding that La. R.S. 40:1799 was not enacted pursuant to the state's police power, and therefore was unconstitutional. *Id.* On direct appeal, the Supreme Court of Louisiana reversed. *Id.* at 19 (Pet. App. at A-98). The court noted that under Louisiana law, a statute is enacted pursuant to the state's police power whenever "its operation tends in some degree to prevent an offense or evil

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[2] The City's Brief incorrectly states that Defendants "announced" plans to have La. R.S. 40:1799 enacted and lobbied the Governor and others to enact this bill. (Pet. at 1.) There is no such evidence in the record, and Defendants ask this Court to ignore the City's misstatement of fact.

[3] The Louisiana Legislature also enacted another statute related to firearms, La. R.S. 9:2800.60, but Defendants' appeal to the Supreme Court of Louisiana only concerned La. R.S. 40:1799 and thus that is the only statute at issue here, despite the City's repeated references to both statutes in its petition.

[4] A peremptory exception of no right of action is Louisiana's analogue to a motion to dismiss for lack of standing.

or otherwise to preserve public health, safety, welfare or morals," and held that it is "beyond question that this challenged statute was passed in the interest of the public as a whole and as an exercise of the state's police power." *Id.* at 15 (Pet. App. at A-89).[5]

The Supreme Court of Louisiana also rejected the City's argument that La. R.S. 40:1799 unfairly benefitted a single industry and therefore violated provisions of the Louisiana Constitution prohibiting special or local legislation, ruling that the statute is a "general" law enacted as part of the State's efforts to maintain centralized and uniform regulation of firearms, an issue of general concern to all Louisiana citizens.[6] 785 So. 2d at 18 (Pet. App. at A-95).

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[5] The City's Brief incorrectly states that the Supreme Court of Louisiana upheld the constitutionality of La. R.S. 40:1799 because it was "interpretive" of the preexisting statute La. R.S. 40:1796. (Pet. at 3.) The City has completely misstated the court's holding. The Supreme Court of Louisiana flatly rejected Defendants' argument in this regard; La. R.S. 40:1796, and the "interpretive" argument were thus not the basis of any part of the Supreme Court of Louisiana's ruling. *Morial*, 785 So. 2d at 17 n.11 (Pet. App. at A-92 n.11). Thus, it is curious that the City devotes several pages of its brief to combating an argument that the Supreme Court of Louisiana has already rejected. *See, e.g.*, Pet. at 7-9 (discussing irrelevant issues such as the meaning of the word "enact" in La. R.S. 40:796).

[6] The City continues to complain in its Petition for Writ of Certiorari that it believes that La. R.S. 40:1799 was merely passed to benefit a specific industry. However, the City does not and cannot ask this Court to review the Supreme Court of Louisiana's holding that this statute was not "special" legislation under the Louisiana Constitution, and there are no similar arguments to be made under the U.S. Constitution. This Court should ignore the

Instead of addressing these holdings, the City attempts to support its petition by focusing on ancillary issues: whether a state may retroactively reserve a right of action to itself, and in what circumstances a political subdivision may raise constitutional challenges against its state.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT PRESENT A CONFLICT

The decision of the Supreme Court of Louisiana represents the first ruling by a state's highest court regarding the constitutionality of state legislation that preempts political subdivisions of a state from bringing "haphazard" and "inconsistent" lawsuits against firearm manufacturers. *Morial*, 785 So. 2d at 16 (Pet. App. at A-91). It necessarily follows that the decision below does not conflict with the decisions of any other state's highest court, with the decision of any federal court of appeals, or with any decision of this Court. Indeed, Petitioners do not claim such a conflict, instead preferring to urge this Court to abandon what Petitioners call its "antique jurisprudence" in favor of "recent developments and expanding principles of local autonomy." (Pet. 6.)

It should go without saying that this unique, first-of-its-kind ruling is not an appropriate vehicle for this Court's consideration. Moreover, and notwithstanding this procedural impediment, it is doubtful that this case would be an

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City's arguments and inferences based on the concept of special and local legislation; this is not an issue that would properly be before this Court even if certiorari were granted.

appropriate vehicle for certiorari in any event. At every turn, Petitioners stress the critical nature, to their case, of the uniquely broad home-rule powers of the City of New Orleans, which Petitioners call "the broadest autonomy of any city in the country." (Pet. at 6; *see also* Pet. at 9 (referring to the City's "broad home rule powers"), Pet. at 9 n.1 (referring to the City's "especially strong home rule powers").) Thus, any decision by this Court would have to be limited to the peculiar facts of this case, and would have dubious application to other cases in light of what Petitioners call the City's uniquely "broad" and "strong" powers.

At bottom, then, Petitioners come to this Court seeking error correction. But, as this Court has long held, it "do[es] not grant a certiorari to review evidence and discuss particular facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), for its "certiorari jurisdiction is designed to serve purposes broader than the correction of error in particular cases." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). *See also Ponte v. Real*, 471 U.S. 491, 501-02 (1985) (Stevens, J., concurring) ("The merits of an isolated case have only an oblique relevance to the question whether a grant of certiorari is consistent with the sound administration of this Court's discretionary docket."). This case is a singularly inappropriate vehicle for consideration of either of the questions presented by the petition.

II. THE DECISION BELOW WAS CORRECT

The petition presents a panoply of constitutional objections to the decision below, none of which is appropriate for this Court's resolution on this record. Moreover, even though Petitioners essentially seek error correction from this Court, and even though error correction is not the function of

this Court's certiorari jurisdiction, there would be no basis for review here in any event because these issues were correctly decided by the court below.

A. The City Has No Constitutional Rights to Challenge the State Legislation

Few tenets of constitutional law are as well settled as the principle that cities cannot complain that their states have deprived them of constitutional rights.[7] *See, e.g., Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 660-61 (1819). In 1907, this Court stated that it was "long settled" that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 177-78 (1907). Accordingly, the state, "at its pleasure, may modify or withdraw all such powers," and "may do as it will, unrestrained by any provision of the Constitution of the United States." *Id.* at 178-79. *Accord, City of Trenton v. State of New Jersey*, 262 U.S. 182 (1923); *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the U.S. Constitution which it may invoke in opposition to the will of its creator").

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[7] Interestingly, the City of New Orleans played a role in the early establishment of this rule of law. *See, e.g., City of New Orleans v. Clark*, 95 U.S. 644, 654 (1877); *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 89-91 (1891).

Vibrant for almost 200 years now, this rule continues to be applied today. *See, e.g., County of Suffolk, New York v. First Am. Real Estate Solutions*, __ F.3d __, 2001 WL 838368, at *6 (2d Cir. July 25, 2001); *Oakland County Bd. of County Road Comm'rs v. Michigan Property & Cas. Guar. Ass'n*, 575 N.W.2d 751, 759 (Mich. 1998); *City of New York v. State*, 631 N.Y.S.2d 553, 555 (N.Y. 1995); *Harris v. Angelina County, Tex.*, 31 F.3d 331, 339 (5th Cir. 1994); *San Francisco Taxpayers Ass'n v. Bd. of Supervisors*, 7 Cal. Rptr. 2d 245, 251 (Cal. 1992); *Housing Auth. of Kaw Tribe of Indians of Okla. v. City of Ponca City*, 952 F.2d 1183, 1188-89 (10th Cir. 1991); *City of Chesterfield v. Director of Revenue*, 811 S.W.2d 375, 377 (Mo. 1991).

The single possible exception to this rule is not presented by the City's suit. In a few cases such as *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.), *cert. denied*, 444 U.S. 827 (1979) (and other cases cited in Petitioner's Brief at 11), courts have held that, even though a city cannot generally assert a constitutional claim against its state, a narrow exception exists when a city argues that a state statute violates a federal law, and therefore runs afoul of the Supremacy Clause. As one court explained:

> As Wright and Miller recognize, *Rogers* is most appropriately interpreted as standing for the proposition that municipalities may bring challenges under federal law to state statutes that regulate the relationship between the state and the municipality. In other words, municipalities may assert claims against the creating state under the Supremacy Clause, *but not under other substantive constitutional guarantees.*

Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders, 893 F. Supp. 301, 315 (D.N.J. 1995) (citation omitted, emphasis added).

The City has not presented a Supremacy Clause challenge to La. R.S.40:1799. Instead, the City rests its argument on clauses such as the Equal Protection Clause, which courts have consistently held are unavailable to municipalities seeking to challenge state statutes. *Williams*, 289 U.S. at 40.

Failing to bring itself within the Supremacy Clause exception to the bar against constitutional challenges by cities against their states, the City of New Orleans attempts to fashion a wholly new exception based on its home rule powers, which it describes as giving it the "broadest autonomy of any city in the country." (Pet. at 6.) However described, New Orleans is still a city, not the fifty-first state. Accordingly, it is still a political subdivision of the State of Louisiana. "Although the City is not to be regarded as a creature of the *legislature* since its powers and functions are granted directly by the constitution, it is undeniably a creature of the *state*." *Morial*, 785 So. 2d at 13 n.10 (Pet. App. at A-84 n.10) (citation omitted; emphasis added). *Accord, City of Trenton*, 262 U.S. at 187.[8] As such, the City's home rule

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[8] This conclusion that the City of New Orleans is subordinate to the State of Louisiana is also supported by this Court's holding in *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982):

> Ours is a "dual system of government" which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "'within the geographical limits of the United States' resides

powers must give way to the State of Louisiana's exercise of its police powers. La. Const. Art. IV, § 9(B).[9]

Lacking a position grounded in the Supremacy Clause, the City of New Orleans cannot object to the State of Louisiana's exercise of its police powers nor can it ask this Court to review the Supreme Court of Louisiana's application of these *state* constitutional provisions. There is no conflict among the state courts or circuit courts of appeal on the applicable law. The City's Petition for a Writ of Certiorari should be rejected.

Additionally, even if the City could raise constitutional arguments against this statute, which it cannot, the constitutional arguments raised by the City also fail on substantive grounds. Specifically:

> either with the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one of the other of these."

Id. at 53-54 (citations omitted), quoting *United States v. Kagama*, 118 U.S. 375 (1886).

[9] The City asserts that because it has the general right to sue, it must have had a specific right of action in this case. (Pet. at 6-7.) But just because the City is an entity with the power to sue and be sued, that does not mean that it will always have a right of action under Louisiana law. Every person in the State of Louisiana has the right to pay the filing fee and file a lawsuit, but they will not always have legally recognized rights of action under Louisiana law.

B. The Statute Is Not a Bill of Attainder

A bill of attainder is a legislative act that applies "either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 135 (1946). *See also United States v. Brown*, 381 U.S. 437, 448-49 (1965). The City cannot possibly complain that La. R.S. 40:1799 is such a bill of attainder. First, the Bill of Attainder Clause only protects individuals, not political entities. *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966) ("courts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to non-judicial determinations of guilt"). Second, La. R.S. 40:1799 is not a "punishment." *See, e.g., Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 475 (1977) (punishments include "imprisonment, banishment, and the punitive confiscation of property by the sovereign, [and] a legislative enactment barring designated individuals or groups from participation in specified employments or vocations"). Third, La. R.S. 40:1799 does not single out the City of New Orleans. *United States v. Brown*, 381 U.S. at 474. The statute speaks in general terms to prohibit *all* political subdivisions in Louisiana from suing firearms manufacturers for the lawful design, manufacture and distribution of firearms. In short, the City has no rights under the Bill of Attainder Clause, and even if it did, La. R.S. 40:1799 simply does not constitute a bill of attainder.

C. The Statute Does Not Violate the Equal Protection Clause

Because the City of New Orleans is not a member of any suspect class, the City can show a violation of the Equal Protection Clause only by demonstrating that La. R.S. 40:1799 is not rationally related to a conceivable and legitimate state end. *Nguyen v. Immig. & Naturalization Serv.*, 121 S. Ct. 2053, 2068 (2001); *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976). This, the City cannot show. The Supreme Court of Louisiana concluded that as an exercise of the state's police power, La. R.S. 40:1799 was a reasonable law "enacted in the interest of public safety and welfare and pursuant to the police power of the state," 785 So. 2d at 15, and therefore by definition, was rationally related to a legitimate state end. The City has not shown otherwise.

D. The Statute Does Not Violate the Due Process Clause

The City possesses no due process rights violated by La. R.S. 40:1799. A city is not a "person" under the Due Process Clause and thus can receive no protection under that clause. *City of East St. Louis v. Circuit Court for Twentieth Judicial Circuit*, 986 F.2d 1142, 1144 (7th Cir. 1993). As one court noted:

> It is difficult to imagine how a municipality can be a "person" under the [Due Process Clause] if its progenitor, the state, cannot be. . . . [A] state cannot confer a constitutional status upon a municipality which the state does not itself enjoy, since the municipality performs the same function as the state.

City of Sault Ste. Marie, Mich. v. Andrus, 532 F. Supp. 157, 167 (D.D.C. 1980). *Accord, South Carolina v. Katzenbach*, 383 U.S. at 323-24.

E. The Statute Does Not Violate the Contract Clause

Although it argued the Contract Clause of Article I before the Supreme Court of Louisiana, the City mentions this clause only in passing here. Any Contract Clause claim by the City in this case would be frivolous. The City did not make claims against Defendants pursuant to any contract; it made products liability claims under tort law. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983). Moreover, even if the City had raised a contract claim, La. R.S. 40:1799 does not impair any contractual right. *Nieves v. Hess Oil Virgin Islands Corp.*, 819 F.2d 1237, 1243 (3d Cir.), *cert. denied*, 484 U.S. 963 (1987). To the contrary, La. R.S. 40:1799(B) specifically allows cities to bring breach of contract claims.[10]

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[10] La. R.S 40:1799(B) provides:

> This Section shall not prohibit the governing authority of a political subdivision or local or other governing authority of the state from bringing an action against a firearms or ammunition manufacturer, trade association, or dealer for breach of contract as to firearms or ammunition purchased by the political subdivision or local authority of the state.

* * *

As a home rule city, the City of New Orleans enjoys greater autonomy than other municipalities in Louisiana pursuant to Article VI of the Louisiana Constitution. But those powers must always yield to the State of Louisiana's exercise of its police powers, such as La. R.S. 40:1799. This was the holding of the Supreme Court of Louisiana under the Louisiana Constitution, and is the final word on this issue of Louisiana law.

The City's attempt to resurrect this case under the U.S. Constitution is groundless. The City of New Orleans is a political subdivision of the State of Louisiana. Under law that has been consistently applied by state and federal courts for almost 200 years, the City cannot argue that a law passed by the State of Louisiana has violated its constitutional rights. There is no disagreement among state or federal courts on this issue. Moreover, even if the City of New Orleans were not barred from attacking La. R.S. 40:1799 under the U.S. Constitution, the constitutional arguments that the City seeks to make fail for specific substantive reasons.

CONCLUSION

For these reasons, the petition should be denied.

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